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No. 05-983

Supreme Court, U.S.
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In The
Supreme Court of the United States

JACOB WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT PARMA CITY SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTINA HENAGEN PEER
(*Counsel of Record*)
CHRISTINE TOMKO COSSLER
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 479-8500
Fax: (216) 479-8780

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether in adhering to the long-standing rule prohibiting lay representation of another's legal interests in court, the Sixth Circuit properly concluded non-attorney parents may not represent their child in court under the Individuals With Disabilities In Education Act ("IDEA").

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Parma City School District states that it is not a subsidiary or affiliate of any corporation including any publicly held corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

In addition to the opinion and order included in the Petition, Respondent includes the September 20, 2005 Order of the United States Court of Appeals for the Sixth Circuit in related case *Winkelman v. Parma City Sch. Dist.*, Case No. 04-4159 (6th Cir. 2004) as the court below referenced this order in the decision that Petitioners ask this Court to review. This order, (Respt. App., *infra.*, 1b-4b), is unreported and is available at 2005 U.S. App. LEXIS 20355.

STATUTORY PROVISIONS INVOLVED

In addition to Section 1415(i)(2)(A) of the Individuals With Disabilities In Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, cited by Petitioners, Section 1415(f)(1), Section 1415(h) and 34 C.F.R. § 303.422(b)(2) are also at issue. Section 1415(f)(1) provides "parents . . . an opportunity for an impartial due process hearing" while Section 1415(h) and 34 C.F.R. § 303.422(b)(2) provide parents at state administrative due process hearings the "right to be accompanied and advised by counsel and by individuals with special knowledge or training * * * [and] present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h); 34 C.F.R. § 303.422(b)(2).

INTRODUCTION

Once stripped of the sympathies and emotions that exist in any special education dispute, this case is a textbook example of a matter that does not warrant this Court's review as it merely involves application of well-settled law. In an unpublished interlocutory decision, the Sixth Circuit

adhered to the customary rule that non-attorneys may not represent the interests of another in court, concluding non-attorney parents may not prosecute their child's substantive IDEA[1] claims in court without legal representation.

There is no basis for this Court to intervene and judicially legislate an exception to this time-honored rule into the IDEA. First, Congress has repeatedly declined to abrogate the venerable common-law principle that non-attorneys cannot represent the interests of another in court. Indeed, while Congress provided non-attorney parents the express right to prosecute their child's IDEA actions during state ***administrative*** proceedings, as recently as the 2004 Reauthorization of the IDEA, it has declined the opportunity to provide a corresponding right during ***judicial*** review. It is well-settled that absent an express, clear Congressional intent to the contrary, common-law principles apply to statutes. Thus, the "party aggrieved" language relied upon by Petitioners merely allows non-attorney parents to bring a suit through counsel on their child's behalf. It does not give parents the right to act as the legal representative in that suit. As the decision below does not threaten the effective enforcement of the IDEA, but instead remains faithful to the IDEA's plain language and Congressional intent, the petition should be denied.

Second, legitimate policy considerations support Congress' refusal to abrogate the common-law rule against lay representation of another's interests in court. Not only is there a strong state interest in regulating the practice of

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[1] In 2004, Congress amended and reauthorized the IDEA, renaming it the Individuals With Disabilities In Education Improvement Act ("IDEIA"). Since Petitioners refer to IDEA, Respondent will do likewise.

law, minor children with disabilities cannot make an informed choice to assume the risk of proceeding without counsel.

Third, Petitioners' alleged square and irreconcilable 1-4-1 split is illusory and premature. The Sixth Circuit joined four other circuits in finding that parents may not prosecute their child's substantive IDEA claims in court without an attorney. Petitioners' allegation that the Sixth Circuit created a three-way split by barring parents from proceeding *pro se* on their own procedural claims paints the picture with too broad a brush. The issue of whether a parent can proceed *pro se* with his/her own procedural claims was never presented to the Sixth Circuit – nor is it the focus here. Rather, the issue expressly before the Sixth Circuit was whether non-attorney parents could represent their children in court. Thus, Petitioners' alleged 1-4-1 split is illusory.

Nor is the split "intractable." In light of Congress' recent decision not to enact a proposed provision allowing parents to represent their child's legal claims in court, the lone circuit taking this position may reconsider given Congress' considered refusal to amend the IDEA on this point. Therefore, a square and irreconcilable split does not exist and this Court should deny the petition.

Finally, this case is not an appropriate vehicle for certiorari. For the majority of the proceedings, Petitioners have not been *pro se* but instead have been represented by counsel. They have also complied with a Sixth Circuit order to obtain counsel in a related appeal. Further, other less procedurally and factually complex cases resulting in a final, as opposed to an interlocutory, order would be a better vehicle for certiorari. Moreover, as Respondent has prevailed at all levels in this case, Petitioners are unlikely

to succeed on the merits of their appeal before the Sixth Circuit regardless of how this Court resolves the *pro se* representation issue.

For these reasons, as it has done with previous petitions on the same issue, *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998); *Wenger v. Canastota Centr. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999), this Court should deny the petition.

STATEMENT OF THE CASE

A. Statutory Framework And Legislative History.

1. The IDEA Does Not Give Parents The Right To Legally Represent Their Child In Court.

As Petitioners note, the statutory framework of the IDEA provides parents with significant procedural protections to ensure their full participation "in the IEP process" and "at every stage of the administrative process." Pet. at 3. (citations omitted). One procedural protection is the express right for a parent to act as their child's legal representative during state administrative proceedings. 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h). The IDEA does not extend this same right to parents during the judicial review process. 20 U.S.C. § 1415(i)(2)(A). This exclusion comports with the venerable common-law rule that non-attorneys may not represent the interests of another in court.

2. Congress Recently Refused To Enact A Proposed Amendment Providing Parents The Right To Prosecute Judicial IDEA Actions On Behalf Of Their Child.

In 2003, the Senate Committee on Health, Education, Labor and Pensions reviewed the IDEA and considered various amendments as part of the reauthorization process. *See generally* S. Rep. No. 108-185, 108th Cong., 1st Sess. (2003). The committee issued a report recommending a proposed amendment regarding the very issue presented by Petitioners:

> It is unquestioned that parents have the right to bring a [due process] complaint and participate in a due process hearing without an attorney.
>
> However, there has been disagreement as to whether a parent may, in effect, 'represent' their child in a civil action that results from an appeal of a due process hearing. ***The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.***
>
> ***Both Federal and State laws generally prevent a non-attorney parent from representing his or her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child. Moreover, it is well-settled law that a minor is disqualified from representing himself or herself in a civil action.***
>
> * * *
>
> [T]he committee believes that parents have a right to represent their child in court, without a lawyer, for purposes of IDEA law, regardless of

> whether their claims involve procedural or substantive issues. ***Therefore, the committee has amended section 615(i)(2) to clarify that a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney.***

Id. at 41-42 (emphasis added).

Yet, despite knowledge of the conflict among the courts, and the Committee's recommendation, Congress chose not to enact the proposed amendment which would have allowed parents to prosecute IDEA claims in court. Thus, the IDEA still does not include any express provision that abrogates the common-law principle prohibiting lay representation of another in court. 20 U.S.C. § 1415(i)(2).

B. Factual And Procedural Background.

Contrary to Petitioners' claim that they cannot afford an attorney, they have been represented during the bulk of these complex proceedings, including during the administrative proceedings, before the District Court, and on a related appeal at the Sixth Circuit.

The fundamental underlying dispute arises from an alleged substantive error regarding Jacob Winkelman's least restrictive environment ("LRE"). Pet. App. 5a. On June 5, 2003, Petitioners filed a request for due process, alleging the Individualized Education Plan ("IEP") offered by Respondent did not offer Jacob a free appropriate public education ("FAPE"). *Id.* Prior to the hearing, the Impartial Hearing Officer (IHO) held that Jacob's stay-put placement during the pendency of the hearing was the Achievement Center for Children ("Achievement Center"). *Id.* Petitioners did not place Jacob at the Achievement Center but instead unilaterally placed him at the private

Monarch School prior to the start of the 2003-04 school year. *Id.*

On February 25, 2004, after conducting a due process hearing, the IHO issued a 56-page decision finding the program offered by Respondent provided Jacob a FAPE. *Id.* 6a. The Petitioners appealed this decision to a State Level Review Officer ("SLRO"). After reviewing the extensive record, on June 2, 2004, the SLRO concluded the IHO did not err in finding Respondent offered Jacob a FAPE. *Id.* Petitioners were represented by counsel throughout the state administrative proceedings. Pet. at 6.

On July 15, 2004, Petitioners, *pro se*, appealed the SLRO's decision to the U.S. District Court for the Northern District of Ohio. *See* Compl. at 10; Pet. App. 6a. On August 23, 2004, Petitioners filed a Motion for Temporary Restraining Order asking the District Court to issue an order making Monarch School Jacob's stay-put placement during the pendency of the court proceedings. Pet. Mot. for TRO 1, 18. The District Court denied the motion on August 24, 2004. *See* Aug. 24, 2004 Order. On September 13, 2004, Petitioners filed a Motion for Reconsideration requesting that the District Court overturn its August 24, 2004 stay-put ruling. Pet. Mot. Reconsider. On September 23, 2004, while their Motion for Reconsideration was pending, Petitioners, *pro se*, filed an interlocutory appeal of the District Court's denial of their request for a stay-put injunction. *See* Not. App. in *Winkelman v. Parma City Sch. Dist.*, Case No. 04-4159 (6th Cir. 2004) (hereinafter "Case No. 04-4159").[2] That same day, Petitioners filed an "Emergency

[2] As the docket in Petitioners' related appeal is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of it. FED. R. EVID. 201(b)(2). In the interest of brevity, Respondent will not

(Continued on following page)

Motion for Injunction Pending Appeal" requesting that the Sixth Circuit "stay" the District Court's August 24, 2004 Order and make the Achievement Center Jacob's stay-put placement. Pet. Em. Mot. Inj. 1, Case No. 04-4159.[3] The next day, Petitioners filed an "Emergency Motion for a Temporary Injunction Pending Adjudication of Request for Permanent Injunction" requesting that the Sixth Circuit issue an order placing Jacob at the Achievement Center. Pet. Em. Mot. Temp. Inj. 4, Case No. 04-4159.[4] Both "emergency" motions were denied. *See* Nov. 4, 2004 Order and March 3, 2005 Order, Case No. 04-4159.[5]

While the proceedings in related Case No. 04-4159 were ongoing, Petitioners obtained counsel to represent them in the District Court proceedings in the instant case and in March 2005, the parties briefed the substantive merits. *See* Pet. Mot. for SJ 16-17; Pet. App. 6a. On June 2, 2005, Judge Manos resolved the underlying dispute finding that the state-appointed hearing officers did not err in concluding Respondent had offered Jacob a FAPE and denied Petitioners' request for reimbursement for Jacob's unilateral placement at Monarch School. Pet. App. 23a. On July 1, 2005, proceeding *pro se*, Petitioners appealed Judge Manos' decision to the Sixth Circuit Court of Appeals. *See* Notice of Appeal.

On September 20, 2005, pursuant to its decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), the Sixth Circuit ordered Petitioners to obtain counsel for Jacob in their related appeal on the stay-put

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continue to recite the text of the rule each time it cites to the docket of this case but instead will merely cite to the judicial notice rule.

[3] FED. R. EVID. 201(b)(2).

[4] *Id.*

[5] *Id.*

issue, Case No. 04-4159, within 30 days. Respt. App., *infra*, 1b-4b.[6] On October 18, 2005, Petitioners retained Jean-Claude André, their counsel in the instant matter, to represent them in Case No. 04-4159. Respt. App. 5b-6b.[7] On January 25, 2006, after supplemental briefing and hearing oral arguments from counsel for both parties, the Sixth Circuit denied Petitioners' appeal regarding the stay-put issue. *See* Jan. 25, 2006 Order, Case No. 04-4159.[8]

On November 4, 2005, the Sixth Circuit ordered Petitioners to obtain counsel for Jacob in the instant case within 30 days. Pet. App. 1a-2a. In response, Petitioners filed a Motion for Stay Pending Certiorari with the Sixth Circuit which was denied on December 1, 2005. Petitioners then filed, through counsel, an Application for Stay Pending Certiorari to this Court which was granted on December 2, 2005. This petition followed.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW COMPORTS WITH THE IDEA'S PLAIN LANGUAGE AND UNWAVERING CONGRESSIONAL INTENT.

This Court should reject the Petition as it asks this Court to effectively preempt the Congressional legislative process and legislate changes to the IDEA from the bench. Not only does this Court have an "obligation to avoid

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[6] As the court below referenced this September 20, 2005 order in the decision that Petitioners ask this Court to review, Respondent believes this decision is part of the record. Alternatively, it is properly appended hereto pursuant to Supreme Court Rule 14(i)(ii), or this Court may take judicial notice of it pursuant to Federal Rule of Evidence 201(b)(2).

[7] FED. R. EVID. 201(b)(2).

[8] *Id.*

judicial legislation," *United States v. Nat'l Treasury Employees*, 513 U.S. 454, 479 (1995), there is no reason for this Court to intervene. Congress has repeatedly decided to uphold the common-law ban on lay representation in court in IDEA actions. Therefore, in adhering to the well-settled prohibition against lay representation, the Sixth Circuit, along with four other circuits, remained faithful to the plain language of the IDEA and Congressional intent.

A. Congress Did Not Abrogate The Common-Law Ban On Lay Representation Of Another's Interests In Court When It Originally Enacted The IDEA.

Consistent with the IDEA and Congressional intent, the Sixth Circuit and four other circuits properly applied the customary and long-standing rule that non-attorneys may not represent the interests of another in court under the IDEA. The "well-settled presumption" is that "Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988). In fact, "courts may take it as a given that Congress has legislated with an expectation that the [common-law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Further, "to [show that Congress intended to] abrogate a common-law principle, the statute must '***speak directly***' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529 (1993) (emphasis added).

Here, it is well-settled that a non-attorney may not represent the interests of another in court. *See e.g., Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) (noting that federal courts have consistently

rejected attempts at third-party lay representation); *Guajardo v. Luna*, 432 F.2d 1324, 1325 (5th Cir. 1970). This prohibition extends to non-lawyer parents representing their minor children in court. *See Devine*, 121 F.3d at 581-82; *Johns v. County of San Diego*, 114 F.3d 874, 876-877 (9th Cir. 1997) (compiling cases holding that non-attorney parents may not proceed *pro se* on behalf of their children); *Osei-Afriyie v. Medical College of Pa.*, 937 F.2d 876, 883 (3rd Cir. 1991); *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986). Congress did not deviate from the default rule against lay representation in the IDEA as the statute fails to "speak directly" to the issue. Instead, the plain text of the IDEA speaks directly to the issue of non-attorney parents representing their child's interests only in administrative proceedings – not judicial proceedings.

As this Court recently explained in applying the default burden of persuasion rule to the IDEA:

> The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. . . . Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

Schaffer v. Weast, 126 S. Ct. 528, 534-35 (2005). As in *Schaffer*, there is no reason to believe Congress intended that the IDEA deviate from the default rule banning non-attorney representation of another's interests in court. To the contrary, although Congress included a provision allowing parents to proceed *pro se* at administrative hearings, it rejected a proposed amendment that would have included a corresponding right to represent their

child's interest in court. 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h); 20 U.S.C. § 1415(i)(2)(A). Under the canon of *expressio unius est exclusio alterius*, Congress' considered refusal to include this provision implies that non-attorney parents cannot represent their children *pro se* in court. As the Sixth Circuit explained in *Cavanaugh*:

> The Cavanaughs can point to no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court. To the contrary, the language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions. The IDEA explicitly grants parents the right to a due process hearing as part of the administrative proceedings provided for by the statute, and the regulations provide to the parents the right to present evidence and examine witnesses on behalf of the child in such a proceeding. 20 U.S.C. § 1415(f)(1); 34 C.F.R. § 303.422(b)(2). In stark contrast, the provision of the IDEA granting "[a]ny party aggrieved" access to the federal courts, 20 U.S.C. § 1415(i)(2)(A), makes no mention of parents whatsoever. Applying the canon of *expressio unius est exclusio alterius*, which says that the mention of one thing implies the exclusion of another, . . . we conclude that the IDEA does not grant parents the right to represent their child in federal court.

Cavanaugh, 409 F.3d at 756 (internal citation omitted). *See also Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3rd Cir. 1998) ("That it did not also carve out an exception to permit parents to represent their child in federal proceedings suggests that Congress only intended to let parents represent their children in administrative proceedings.").

Again, this Court's rationale in the recent *Schaffer* decision is instructive:

> Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA . . . includes a so-called "stay-put" provision, which requires a child to remain in his or her "then-current educational placement" during the pendency of an IDEA hearing. § 1415(j). Congress could have required that a child be given the educational placement that a parent requested during a dispute, but it did no such thing.

Shaffer, 126 S. Ct. at 536. Likewise, Congress could have expressly allowed non-lawyer parents to proceed *pro se* on behalf of their children in court. Yet despite the opportunity to do so mere months after acknowledging a judicial split, Congress did no such thing. The fact that it did not compels the conclusion that Congress did not intend to abrogate the common-law rule and give parents the right to prosecute their child's IDEA actions in court without an attorney.

Petitioners' reliance upon the IDEA's "party aggrieved" language and the First Circuit's rationale in *Maroni v. Pemi-Barker Reg'l School District*, 346 F.3d 247 (1st Cir. 2003) is misplaced. According to the *Maroni* court, because the IDEA allows "any party aggrieved" by a final administrative decision to "bring a civil action"[9] in federal court, non-attorney parents may prosecute their child's IDEA claims *pro se*. *Maroni*, 346 F.3d at 250. This interpretation runs *contra* to the majority interpretation of similar language contained in Rule 17(c) of the Federal Rules of Civil Procedure. Rule 17(c) provides that "whenever an

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[9] 20 U.S.C. § 1415(i)(2)(A).

infant or incompetent person has a representative, such as a general guardian, . . . the representative may sue or defend on behalf of the infant or incompetent person." FED. R. CIV. P. 17(c). As numerous courts have concluded, this rule allows the guardian to sue on the incompetent person's behalf; it does not allow a non-attorney guardian to represent the child in court. *See Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147 (7th Cir. 2001) (non-custodial parent could not bring suit on behalf of himself and his son, acting as the son's next friend, because parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [son's] legal representative"); *Johns*, 114 F.3d at 876-877; *Devine*, 121 F.3d at 581-82; *Osei-Afriyie*, 937 F.2d at 882; *Cheung*, 906 F.2d 59; *Meeker*, 782 F.2d at 154. Likewise, the IDEA's "party aggrieved" language does not give non-lawyer parents the right to represent their child in court. Rather, it allows them to obtain counsel to seek judicial review of state administrative proceedings.

Therefore, this Court should reject Petitioners' call to usurp the Congressional legislative process.

B. Congress Again Declined To Abrogate The Common-Law Rule When It Reauthorized The IDEA In 2004.

The fact that Congress recently considered this issue ***but declined to amend the IDEA to allow non-attorney parents to represent their children in court*** underscores the fact that there is no reason for this Court to intervene and judicially legislate an amendment that Congress expressly rejected. As Petitioners point out, the Senate Committee charged with studying the IDEA "devoted significant attention to the issue" in 2003 when it considered the reauthorization of the IDEA. Pet. at 16. As

discussed *supra*, the Committee recognized that some courts found that the plain language of the IDEA did not allow non-lawyer parents to represent their child without an attorney in court. S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003). In response, the Committee drafted a provision modifying the IDEA to expressly include such a right. *Id.* Yet, when it amended the IDEA less than a year later, Congress did not embrace the proposed amendment.[10] Given the Committee's express recognition that courts were interpreting the existing language as not allowing parents to proceed *pro se* in court, if Congress intended for parents to have such a right, it would have enacted the proposed amendment. As Congress did not enact the amendment, this Court's intervention is not warranted.

II. LEGITIMATE POLICY CONSIDERATIONS SUPPORT CONGRESS' REFUSAL TO ABROGATE THE COMMON-LAW RULE UNDER THE IDEA.

Substituting judicial legislation for the Congressional legislative process is also not warranted as legitimate policy considerations support the rule against non-attorney legal representation of minor children in court. As the *Collinsgru* court noted, there is a strong state interest in regulating the practice of law as well as preventing vexatious claims:

> First, there is a strong state interest in regulating the practice of law. Requiring a minimum level of competence protects not only the party

[10] Significantly, as before, Section 1415(i)(2)(A) of the reauthorized IDEA still fails to grant non-attorney parents a right to proceed *pro se* on behalf of their children in judicial proceedings. 20 U.S.C. § 1415(i)(2)(A).

> that is being represented but also his or her adversaries and the courts from poorly drafted, inarticulate, or vexatious claims. . . . The second consideration is the importance of the rights at issue during litigation and the final nature of any adjudication on the merits. Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not.

Collinsgru, 161 F.3d at 231 (citations omitted). A review of the docket in these proceedings supports the interests expressed in *Collinsgru*.

Another policy consideration is a child's inability to make an informed choice to assume the risk of proceeding without counsel. When a competent adult chooses to proceed without counsel, the adult has knowingly assumed the risk of mistakes associated with untrained representation. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000) ("In particular, a willfully unrepresented plaintiff volitionally assumes the risks and accepts the hazards, which accompany self representation."). However, the same cannot be said for Jacob and other minor disabled children. As the Second Circuit noted:

> The choice to appear *pro se* is not a true choice for minors who under state law, cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect. . . . It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

Cheung, 906 F.2d at 61 (internal citations omitted).

Simply put, love and passionate advocacy for a child cannot substitute for appropriate legal training in a court of law. *Osei-Afriyie v. Medical College of Pennsylvania* particularly illustrates the risks associated with minor children being represented by well-intentioned non-attorney parents. In *Osei-Afriyie,* a father brought numerous tort claims on behalf of himself and his two daughters relating to the daughters' medical treatment for malaria. *Osei-Afriyie*, 937 F.2d 876. On appeal after a defense verdict, the Third Circuit noted that the district court had erroneously failed to instruct the jury on equitable tolling and directly attributed this error to Osei-Afriyie's lack of experience and legal training. *Osei-Afriyie*, 937 F.2d at 882. According to the court, "Osei-Afriyie is a well-educated economist. He is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard." *Id.* The appellate court ultimately remanded the case to the district court and vacated the judgments against the children because the parent, as a non-lawyer, "was not entitled to represent his children in place of an attorney." *Id.* at 883.

These policy considerations are especially important in IDEA cases due to the procedural and substantive complexity of this area of the law. The fact that the IDEA allows parents to represent their children *pro se* during administrative proceedings does not obviate this risk. Court proceedings are more complex and formal than state administrative proceedings. For example, the Rules of Civil Procedure and Evidence are often applied loosely or not at all in administrative hearings.

The alleged difficulty in obtaining counsel to prosecute IDEA disputes does not overcome the risks associated with inadequate representation by non-lawyer parents. First, Petitioners paint an incomplete picture regarding legal

options available to parents with limited financial resources. While Petitioners are quick to note that 36% of the children receiving special education services live in households with incomes of $25,000 or less, Pet. at 15, they fail to recognize that these children may qualify for court-appointed counsel. *See* 28 U.S.C. § 1915(e). Additionally, low-cost[11] or *pro bono* legal services may be available. Indeed, Petitioners successfully obtained *pro bono* counsel both for the instant petition as well as the supplemental merit briefing in their related Sixth Circuit appeal, Case No. 04-4159. Respt. App. 5b-7b, 16b-17b.[12] They also were able to obtain legal representation for the bulk of the District Court proceedings below. *See generally* Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV-1329 (N.D. Ohio 2004). Notably, Petitioners have not alleged that they attempted to obtain counsel and were turned down. Therefore, Petitioners' dire prediction that the decision below will allow school districts that lose at the administrative level to obtain *de facto* reversal if they seek judicial review against a parent of limited financial means is pure speculation. The IDEA also allows for reimbursement of attorney's fees to prevailing parents. 20 U.S.C. § 1415(i)(3)(b).

Finally, while Petitioners' claim about the alleged plight of parents of limited financial resources is sympathetic, it is the responsibility of Congress, not this Court, to abrogate the common-law rule barring lay representation. Petitioners fail to point to any IDEA provision that "directly speaks" to this issue and abrogates the prohibition

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[11] Congress apparently recognized parents may have limited financial resources and expressly required school districts to provide parents involved in due process proceedings with a list of free or low-cost legal services available in the area. 34 C.F.R. § 300.507(a)(3).

[12] FED. R. EVID. 201(b)(2).

on non-lawyers representing the interests of another in court. Therefore, certiorari should be denied.

III. PETITIONERS' ALLEGED SQUARE AND INTRACTABLE THREE-WAY CIRCUIT "SPLIT" IS ILLUSORY AND PREMATURE.

A. There Is No Three-Way Split.

Petitioners mischaracterize the circuits as being in a "well-recognized 1-4-1 split" regarding whether and under what circumstances non-lawyer parents may prosecute an IDEA case in court. Respondent agrees that five circuits have found that non-attorney parents may not represent their child in court on an IDEA action alleging violations of ***substantive*** rights. *See Mosley v. Bd. of Educ.*, 434 F.3d 527, 532 (7th Cir. 2006); *Cavanaugh*, 409 F.3d 753; *Collinsgru*, 161 F.3d at 231; *Wenger*, 146 F.3d at 124-26; *Devine*, 121 F.3d at 582. Further, one lone circuit has found that parents may proceed *pro se* on behalf of their child in an IDEA action regardless of whether substantive or procedural violations are alleged. *Maroni*, 346 F.3d at 249-50.

However, Petitioners read both the Sixth Circuit's decision in *Cavanaugh v. Cardinal Local School District* and in the instant case[13] too broadly when they assert that these decisions create a three-way split by imposing an absolute bar to parents' ability to bring an IDEA action *pro se* in court. In *Cavanaugh*, no procedural violations were at issue.[14] Instead, the *Cavanaugh* court found that parents

[13] The decision below applied the *Cavanaugh* precedent. This Court's review was not sought in *Cavanaugh*.

[14] The *Cavanaugh* court framed the issue as follows: "The Cavanaughs, who are not lawyers, argue that their appeal is properly before this court because: 1) they may represent Kyle's rights under the IDEA

(Continued on following page)

cannot proceed *pro se* on a joint substantive rights theory. As the court explained:

> We are mindful that the IDEA does grant parents of disabled students a narrow set of procedural rights, *see Wenger*, 146 F.3d at 126; *Collinsgru*, 161 F.3d at 233, which include a parent's right to participate in meetings that evaluate the child's performance, 20 U.S.C. § 1415(b); to receive prior written notice whenever the agency proposes a change to the IEP, 20 U.S.C. § 1415(b)(3); and to participate in due process hearings. 20 U.S.C. § 1415(f)(1). However, these procedural rights exist only to ensure that the child's substantive right to a FAPE is protected and do not confer on the parents a vicarious, ***substantive*** right to a ***FAPE.***
>
> * * *
>
> Adopting instead the reasoning of *Collinsgru*, 161 F.3d at 232-37, we hold that the right of [sic] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents. Therefore, any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to receive a FAPE, and wholly dependent upon the Cavanaughs' proceeding, through counsel, with their appeal on Kyle's behalf.

Cavanaugh, 409 F.3d at 757 (emphasis added). The *Cavanaugh* court's reference to adopting the *Collinsgru* court's

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and 2) the IDEA grants them a cognizable right of their own to a ***FAPE*** for their son." *Cavanaugh*, 409 F.3d at 755 (emphasis added). The right to a FAPE is not an enumerated procedural right given to parents under the IDEA but instead is one of the fundamental substantive rights provided by the IDEA. 20 U.S.C. § 1400(d)(1)(A) (FAPE substantive right); 20 U.S.C. § 1415(a) (procedural rights).

reasoning suggests its ruling was limited to substantive IDEA rights.[15]

Likewise, Mr. and Mrs. Winkelmans' right to proceed *pro se* on their procedural claims in the instant proceedings was never expressly before the Sixth Circuit. Rather, the focus of the parties was whether Mr. and Mrs. Winkelman, as non-lawyers, could represent Jacob in court.[16] *See* Pet. App. 1a-2a; Respt. App. 18b, 20b, 22b-23b, 33b-36b, 71b-75b. Indeed, the Sixth Circuit made no mention of any procedural rights being asserted by Petitioners. Instead, the appellate court stated, "As established in this Court's order filed on September 20, 2005, in related appeal No. 04-4159, Jeff and Sandee Winkelman are not permitted to represent their child in federal court nor can they pursue their own IDEA claim *pro se*." Pet. App. 1a-2a. The September 20, 2005 Order referenced by the Sixth Circuit did not expressly address procedural IDEA claims as it was issued in a related proceeding where only a substantive IDEA claim regarding Jacob's stay-put placement was

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[15] Other courts have interpreted the *Collinsgru* decision as allowing parents to proceed *pro se* on procedural claims but not substantive claims. *See, e.g.*, *Mosley*, 434 F.3d at 532; *Maroni*, 346 F.3d at 249.

[16] Even if Petitioners' alleged procedural violations had been expressly presented, they are intertwined with substantive IDEA claims. Specifically, their allegations that Respondent predetermined the IEP and the IHO issued an untimely decision fundamentally relate to Jacob's substantive right to a FAPE. Further, assuming *arguendo* that the Sixth Circuit erroneously concluded that Petitioners were only bringing substantive IDEA claims, this does not provide a basis for this Court's intervention as it is well-settled that this Court does not grant certiorari to correct erroneous factual findings. SUPREME COURT RULE 10 (2005).

raised.[17] Respt. App. 2b-4b. The appellate court's reference to its September 20, 2005 Order, and the fact that the Winkelmans' right to bring their own procedural claims was not expressly addressed, suggests that Mr. and Mrs. Winkelman were precluded from pursuing their own substantive IDEA claims – not their procedural claims. Thus, the decisions in *Winkelman* and *Cavanaugh* did not clearly create a three-way split.[18]

Further, contrary to Petitioners' assertion that the alleged 1-4-1 split is "well-recognized," no court appears to have expressly interpreted *Cavanaugh* or *Winkelman* as imposing an absolute bar to *pro se* representation.[19] In fact, the cases cited by Petitioners fail to mention the 1-4-1 split allegedly created by the Sixth Circuit. Indeed, the *Mosley*

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[17] In that Order, the Sixth Circuit stated that the *Cavanaugh* panel "concluded that parents cannot pursue their own substantive IDEA claim *pro se*." Respt. App. 3b.

[18] Even if the Sixth Circuit's rulings did preclude non-attorney parents from prosecuting their own procedural claims *pro se*, this ruling is of no practical consequence as parents alleging procedural violations may only recover under the IDEA if they show the procedural violation deprived the child of the substantive right to a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii). Therefore, a parent's procedural rights and their child's substantive right to a FAPE are inextricably intertwined.

[19] At the time this brief was printed, no cases citing these two decisions expressly interpreted them in this manner. *See Ryan v. Shawnee Mission U.S.D. 512*, 2006 U.S. Dist. LEXIS 7779 (D. Kan. Feb. 28, 2006) (unreported); *C.O. v. Portland Pub. Sch.*, 2005 U.S. Dist. LEXIS 39161, *23-27 (D. Or. Dec. 22, 2005) (unreported); *Green v. Cape Henlopen Sch. Dist.*, 2005 U.S. Dist. LEXIS 32268 (D. Del. Dec. 13, 2005) (unreported); *Dividock v. KCAD-FSU*, 2005 U.S. Dist. LEXIS 33470 (D. Mich. Dec. 6, 2005) (unreported); *Crawford v. Meyzeek Middle Sch.*, 2005 U.S. Dist. LEXIS 29410 (D. Ky. Nov. 17, 2005) (unreported); *Dividock v. KCAD-FSU*, 2005 U.S. Dist. LEXIS 36605 (D. Mich. Aug. 30, 2005) (unreported); *Avion v. Franklin County Prosecuting Atty's Office*, 2005 U.S. Dist. LEXIS 11669 (S.D. Ohio June 14, 2005) (unreported).

court never addressed *Cavanaugh* or *Winkelman* but instead merely stated, "Most of our sister circuits take the position that the IDEA thus confers different rights on children and parents: both substantive and procedural rights for the child, and procedural rights only for the parents." *Mosley*, 434 F.3d at 532. Likewise, the *C.O.* court did not reference the claimed "well-recognized" 1-4-1 split, but instead noted that the First Circuit is the only circuit to embrace the "party aggrieved" theory. *C.O. v. Portland Pub. Sch.*, 2005 U.S. Dist. LEXIS 39161, *23-27 (D. Or. Dec. 22, 2005) (unreported).

In sum, the Sixth Circuit's decisions in *Cavanaugh* and *Winkelman* do not clearly preclude parents from proceeding *pro se* on their own procedural IDEA claims. Thus, these decisions do not create a square and irreconcilable three-way conflict.

B. Characterizing The Split Regarding Substantive IDEA Claims As Intractable Is Premature.

Although a split exists as to whether non-attorney parents may bring substantive IDEA claims *pro se* on behalf of their children in court, it is too early to characterize the split as intractable. The lone circuit to find that non-lawyer parents may always proceed without an attorney in a judicial IDEA action did so in a single ruling which has not been subsequently applied. *Maroni*, 346 F.3d at 249-50. Further, this circuit has not addressed the issue since Congress rejected a proposed amendment to the 2004 Reauthorized IDEA that would have permitted such representation. Given that Congress was aware of the split among the courts and did not adopt the First Circuit's position, the First Circuit may reconsider its

position in a future case. Consequently, it is premature to claim that an intractable split exists.

Thus, this Court's intervention is not warranted at this time as there is no evidence of an irreconcilable or intractable split among the Circuits.

IV. THIS CASE PRESENTS A POOR VEHICLE FOR CERTIORARI.

Assuming *arguendo* that the *pro se* representation issue is appropriate for this Court's review, this case is not a proper vehicle for certiorari.

A. The Decision Below Did Not Create A Square And Intractable Conflict.

First, as discussed *supra*, the ability of a parent to proceed *pro se* on procedural violations was neither squarely presented nor resolved by the court below. Further, even if Petitioners' procedural violations had been squarely presented, they are intertwined with substantive IDEA claims and do not provide a good vehicle for certiorari. Likewise, to the extent a square conflict exists regarding a non-attorney parent's ability to prosecute a substantive IDEA claim for their child in court, it is too early to proclaim that the split is intractable. Therefore, this case is not an appropriate vehicle to resolve the question presented.

B. Petitioners Have Not Been *Pro Se* Throughout The Majority Of These Proceedings.

This case is also a poor vehicle to resolve the *pro se* question because Petitioners have not been *pro se* throughout all the proceedings. To the contrary, they were represented by an attorney at all levels of the state due

process proceedings and administrative review. Pet. at 6. Additionally, they were represented by an attorney at various times throughout the judicial proceedings, including during the briefing on the merits before the District Court. Pet. Mot. SJ 1, 18. Further, they were represented by counsel, *pro bono*, in the supplemental briefing and oral argument before the Sixth Circuit on a related appeal which was recently resolved against them by the Sixth Circuit.[20] *See* Docket in Case No. 04-4159.[21] Likewise, they are represented, *pro bono*, by counsel before this Court.

C. Other Less Procedurally And Factually Complex Cases Would Be More Appropriate For Certiorari.

The three-year record in this case is factually and procedurally complex. *See* Pet. App. 3a-23a; Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV1329 (N.D. Ohio 2004); Docket in Case No. 04-4159.[22] Therefore, other cases with less developed records would be more appropriate vehicles for certiorari. As Petitioners note, the *pro se* issue is currently awaiting decision in at least one appeal in another circuit and one district court proceeding.

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[20] Given the policy concerns surrounding representation of a child by a non-attorney parent in this complex area of law, one important consideration is whether a non-attorney parent will have the skills to adequately represent the child's interest. As Petitioners have had counsel through most of these proceedings, this case presents a poor vehicle for making this determination. As shown by the docket below, during the periods in which Petitioners attempted to represent their child's interests *pro se*, their struggles with the judicial process, resulting in inappropriate and needless filings, supports the very concerns identified by the circuit courts.

[21] FED. R. EVID. 201(b)(2).

[22] FED. R. EVID. 201(b)(2).

See, e.g., Brief of Petitioners-Appellants, *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (9th Cir. Jul. 16, 2004) and accompanying docket; Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005) and accompanying docket.[23]

While either of these cases would be a better vehicle for certiorari, *Russell* in particular is better suited for certiorari. First, because the District Court in *Russell* dismissed the case at the outset based upon the *pro se* representation issue without any decision on the underlying merits, the *pro se* question is the sole issue on appeal. *See* Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 1:03CV00654 (Hawaii 2003).[24] Here, unlike *Russell*, the District Court did not address the *pro se* representation issue as Petitioners obtained counsel before the court decided Respondent's motion to dismiss based on this issue. *See* Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV1329 (N.D. Ohio 2004). Instead, the District Court below reached a decision on the merits of the underlying appeal after Petitioners obtained counsel. Additionally, the *Russell* parents appear to have been *pro se* throughout the proceedings and were never represented by counsel. *See* Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 1:03CV00654 (Hawaii 2003). Further, the judgment in the *Russell* case will be final after the appellate court's ruling. *Id.*

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[23] Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of them. FED. R. EVID. 201(b)(2).

[24] FED. R. EVID. 201(b)(2).

D. The Judgment Below Is Not Final.

This case also presents a poor vehicle for certiorari as the judgment below is not final. This Court has often noted that certiorari from interlocutory appeals is disfavored. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of cert.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *American Constr. Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). This Court grants certiorari before a case has been disposed of only when the case is of such "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination." SUPREME COURT RULE 11 (2005). These cases involve constitutional challenges, *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (constitutionality of the Federal Sentencing Guidelines); *Clinton v. City of New York*, 524 U.S. 417, n.14 (1998) (constitutionality of the line-item veto), public emergencies, *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947), or issues fundamental to further conduct in the case, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

With all due respect to Petitioners, this case does not involve a similar issue of "imperative public" or fundamental importance. Petitioners' arguments in their supplemental brief regarding the unauthorized practice of law ("UPL") proceedings[25] are based entirely on speculation and therefore do not have a place in this Court's decision process. First, there is no evidence of any "impending

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[25] Respondent questions whether these documents are properly before the Court but assuming *arguendo* that they are, they do not provide a basis for this Court to grant certiorari.

prosecution of the Winkelmans for UPL." While one of Petitioners' appended documents references a purported UPL investigation of them, Supp. Pet. App. 4a, it is pure speculation to suggest that this investigation is ongoing or that prosecution is impending. Indeed, given that the Cleveland Bar Association acknowledged that the Sixth Circuit Order in Petitioners' underlying appeal is stayed, *id.* App. 9a, impending prosecution of Petitioners is unlikely.

Further, the complaint against the Woods, who are not parties to the instant proceeding, does not make this case a matter of imperative public importance. This complaint appears to be an isolated charge that was prompted by Mr. Woods' failure to cooperate with the UPL investigation. Indeed, the Cleveland Bar Association noted:

> Since the Board of Commissioners issued an Order requiring Mr. Woods to appear and he failed to appear [for a deposition], the Relator, Cleveland Bar Association, has no other option but to seek application of this Court for an Order finding Mr. Woods in contempt of this Court and sanctioning him for costs and attorneys' fees for his willful disobedience of both lawful process under Rule 45 and willful disobedience of the Board of Commissioner's Orders.

Id. App. 5a-6a.[26]

Finally, Petitioners' predictions that the decision below may lead to similar charges by other "overzealous" bar associations and will "necessarily" have a chilling effect on non-attorney parental representation of their child in court are wholly speculative. Notably, Petitioners fail to identify any other pending state bar association

[26] This Court does not need to grant certiorari to provide a remedy to the Woods as they have a strong defense in arguing that retroactive application of the *Cavanaugh* decision is improper.

complaint. Therefore, none of the arguments in Petitioners' supplemental brief provide a basis for this Court's intervention.

Additionally, this case does not present an issue which is fundamental to the further conduct of the case. Petitioners allege that absent this Court's intervention, they will have to choose between either (1) allowing the appellate court's dismissal order to become final so they can again petition this Court for review or (2) obtain a lawyer they cannot afford and moot any future opportunity to test their belief in their right to prosecute their appeal *pro se*. Pet. at 22. These claims are unavailing. First, as discussed *supra*, Petitioners' assertion that they cannot afford to obtain legal counsel is speculative as other avenues to obtain legal counsel exist.

Likewise, over a century of this Court's precedent confirms that requiring Petitioners to proceed through the normal judicial process before challenging the Sixth Circuit's ruling will not moot the *pro se* representation issue. *See Church of Scientology of California v. United States*, 506 U.S. 9, n.9 (1992) (citing seven appellate cases concluding that compliance with a federal court order does not moot that issue for appeal); *Maher v. Roe*, 432 U.S. 464, n.4 (1977); *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, Syllabus (1950); *Dakota Cty v. Glidden*, 113 U.S. 222, 225 (1885).

Therefore, given the exceptionally high standard of Rule 11, this Court should not deviate from normal procedure and grant interlocutory certiorari on this issue.

E. Petitioners Are Unlikely To Succeed On The Merits Of Their Appeal Regardless Of The Outcome Of This Petition.

Finally, this case is a poor vehicle for certiorari as Petitioners are unlikely to succeed on the merits of their

appeal before the Sixth Circuit regardless of how this Court resolves the *pro se* representation issue. As Respondent has prevailed at all levels in this case, Petitioners face the heavy burden of showing that the Impartial Hearing Officer, State Level Review Officer and the District Court all erred in concluding that Respondent's proposed placement offered Jacob a FAPE. *Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 460-61 (6th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990). Given this burden, it is unlikely that Petitioners will succeed on the merits of their underlying appeal. Further, while Respondent recognizes and respects Petitioners' right to vigorously prosecute Jacob's legal rights, Respondent and its taxpayers have a corresponding right to an efficient and timely resolution to these legal proceedings. Therefore, this case presents a poor vehicle for certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTINA HENAGEN PEER
(*Counsel of Record*)
CHRISTINE TOMKO COSSLER
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 479-8500
Fax: (216) 479-8780

April 6, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

JILL COLYER
(513) 564-7024
www.ca6.uscourts.gov

Filed: September 20, 2005

Jeff Winkelmann
1853 Jacqueline Drive
Parma, OH 44134

Sandee Winkelman
1853 Jacqueline Drive
Parma, OH 44134

Christina H. Peer
Squire, Sanders & Dempsey
127 Public Square
Suite 4900 Key Tower
Cleveland, OH 44114-1304

RE: 04-4159
Winkelman vs. Parma School
District Court No. 04-01329

Enclosed is a copy of an order which was entered today in the above-styled case.

Jill Colyer
Case Manager

Enclosure

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 04-4159

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, JEFF and SANDEE WINKELMAN, Plaintiffs-Appellants, v. PARMA CITY SCHOOL DISTRICT, Defendant-Appellee.	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) NORTHERN DISTRICT OF OHIO (Filed Sep. 20, 2005)

Before: SILER and SUTTON, Circuit Judges; SHARP, District Judge.*

PER CURIAM. Jeff and Sandee Winkelman brought this action under the Individuals with Disabilities Education Act (IDEA), *see* 20 U.S.C. § 1400 *et seq.*, seeking an appropriate educational placement for their son, Jacob. Unable to obtain relief in the district court, they filed this appeal.

Before reaching the merits of the appeal, we face a threshold question about the authority of the Winkelmans to appear *pro se* in asserting Jacob's rights under the IDEA. Our recent decision in *Cavanaugh v. Cardinal*

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* The Honorable Allen Sharp, United States District Judge for the Northern District of Indiana, sitting by designation.

Local School District, 409 F.3d 753 (6th Cir. 2005), provides a dispositive answer to this question and (for now) to this appeal. According to *Cavanaugh,* "the IDEA does not grant parents the right to represent their child in federal court." *Id.* at 756. In reaching this conclusion, we reasoned that the IDEA "'expressly provided that parents were entitled to represent their child in administrative proceedings'" but did not "'carve out an exception to permit parents to represent their child in federal proceedings,'" an omission that prompted the inference "'that Congress only intended to let parents represent their children in administrative proceedings.'" *Id.* (quoting *Collinsgru v. Palmyra Bd. of Educ.,* 161 F.3d 225, 232 (3d Cir. 1998)); *see also id.* ("[T]he language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions."). At the same time, we also concluded that parents cannot pursue their own substantive IDEA claim *pro se,* because the IDEA does not grant parents a substantive right to have their child receive a free appropriate public education. *See id.* at 757 ("[T]he text of the IDEA does not support the proposition that its guarantee of a [free appropriate public education] is a right that [a child] shares jointly with his parents."); *id.* ("[T]he intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual.") (quotation omitted).

In urging us to reach a contrary conclusion, the Winkelmans make two arguments that *Cavanaugh* specifically considered and rejected. In concluding that "the language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions," *id.* at 756,

Cavanaugh contradicts the Winkelmans' claim that the legislative purpose of the statute supports their right to proceed *pro se*. And *Cavanaugh* likewise "considered, and reject[ed], the reasoning of the First Circuit in *Maroni [v. Pemi-Baker Regional School District*, 346 F.3d 247 (1st Cir. 2003)]," upon which the Winkelmans rely here. *Cavanaugh*, 409 F.3d at 757. Under these circumstances, we must follow the course that *Cavanaugh* has charted for us. We accordingly dismiss the appeal unless "within 30 days of the entry of this opinion the docket on appeal reflects the entry of appearance of counsel" to represent Jacob. *Id.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

IMPORTANT NOTICE:

Lead counsel must be designated if a party is represented by more than one attorney or law firm. While the Clerk's office will accept documents from any attorney who has entered an appearance and has been admitted to the Bar, only lead counsel will be on the court's service list. It is the responsibility of lead counsel to advise co-counsel of court deadlines, orders, notice of argument, decisions and any other case related activity.

COA Case No.: 04-4159 Case Manager: Jill Coyler
(from case opening letter. Required if form faxed)

Client's Name: Jacob Winkelman, Jeff Winkelman, and Sandee Winkelman

☑ Appellant ☐ Petitioner ☐ Amicus Curiae
☐ Appellee ☐ Respondent ☐ Intervenor

I am:
☑ Lead Counsel
☐ Co-Counsel

Name: Jean-Claude Andre Admitted: May 17, 2004
(Sixth Circuit admission date only)

Signature: Jean Claude Andre

Firm Name: Ivey, Smith & Ramirez

Business Address: 2602 Cardiff Ave.

Suite: [ ] City/State/Zip: Los Angeles, CA 90034

Telephone Number: (Area Code) (310) 558-0932
Fax: (310) 558-0932

E-mail Address: jc.andre@isrlaw.com

The court is anticipating greater use in the near future of e-mail to send notices to counsel. If you are willing to receive notices by e-mail, please provide your e-mail address.

Fax this form to the Clerk's office at (513) 564-7096 and serve opposing counsel. A cover letter is not necessary. Do not mail the form if you faxed it.

TRANSMISSION VERIFICATION REPORT

TIME : 10/18/2005 10:14
NAME : JEAN-CLAUDE ANDRE
FAX : 3105580932
TEL : 2025951445
SER. # : 000E3J129822

DATE, TIME	10/18 10:13
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APPENDIX C

JAMES D. IVEY
MICHAEL G. SMITH
ELLIS B. RAMIREZ

OF COUNSEL
JEAN-CLAUDE ANDRÉ

JEAN-CLAUDE ANDRÉ
jc.andre@isrlaw.com

LOS ANGELES OFFICE
2602 CARDIFF AVE.
LOS ANGELES, CA 90034-1843
(310) 558-0932
VOICE/FACSIMILE

LAW OFFICES
IVEY, SMITH AND RAMIREZ
SUITE 800
1090 VERMONT AVENUE, NW
WASHINGTON, DC 20005-4927
(202) 595-1444 EXT. 4 VOICE
(202) 595-1445 FACSIMILE
HTTP://WWW.ISRLAW.COM

November 15, 2005

Attn: Jill Colyer
Hon. Leonard Green, Clerk of Court
United States Court of Appeals
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988
Facsimile: (513) 564-7096
VIA FACSIMILE

FACSIMILE TOTALS 6 PAGES
(FIVE-PAGE LETTER-BRIEF PLUS
ONE-PAGE PROOF OF SERVICE)

Re: *Winkelman ex rel. Winkelman v. Parma City School District*, No. 04-4159

Dear Mr. Green:

In response to this Court's October 25, 2005, Order, Appellants submit this letter-brief in support of their interlocutory appeal of the district court's August 24, 2004, denial of their request for an injunction to designate the Monarch School ("Monarch") as Jacob's proper "stay-put" educational placement, (R. 8 Aug. 24, 2004 Order).[1] For the reasons set forth in Appellants' *Pro Se* Opening Brief and set forth below, Appellants respectfully request that this Court either reverse, or alternatively, vacate with instructions the district court's August 24, 2004, Order.

The parties agree, (Appellants Br. at 5; Parma Br. at 25), that, rather than analyze the merits of Appellants' argument that Monarch was the proper stay-put placement for Jacob, the district court concluded that Appellants forfeited their right to stay-put placement by, in the district court's words, "unilaterally remov[ing] their child from public school prior to the completion of the IDEA review process . . . at their own financial risk," (R. 8 Aug. 24, 2004, Order, at 3 (quoting *Knable v. Bexley City Sch.*

[1] On November 2, 2005, this Court extended the deadline by which this letter-brief was due to and including November 15, 2005. The Court's order was silent as to when Appellee's letter-brief in response shall be due. As Appellants noted in their November 1, 2005, motion seeking the extension, Appellants have no objection to Appellee being given an equal amount of time in which to file their letter-brief in response.

Dist., 238 F.3d 755, 763 (6th Cir. 2001))). This conclusion was in error. The district court confused the unavailability of Jacob's "then-current educational placement," 20 U.S.C. §1415(j), Achievement Centers for Children ("ACC"), which required Appellee to "provide [Jacob] with placement in a similar program during the pendency of administrative and judicial proceedings," *Laster v. Dist. of Columbia*, ___ F. Supp. 2d ___, 2005 WL 2429748, *3 (D.D.C. Sep. 26, 2005) (citations omitted), with those situations in which parents "unilaterally place" their child at their own financial risk, *see Knable,* 238 F.3d at 763.

Appellants' placement of Jacob at Monarch was not a "unilateral placement" within the meaning of the IDEA. The term "unilateral placement" does not appear in the IDEA. Courts, including this Court, have used the term to connote those situations in which parents remove their disabled child from the child's "then-current educational placement" (a public school or a private school for which the school district agreed to pay) and, while challenges to the appropriateness of the public school's Individualized Education Plan ("IEP") for the child is being disputed, enroll the child at a private (or different private) school. *See, e.g., Burlington Sch. Comm. v. Mass. Dep't of Ed.*, 471 U.S. 359, 362 (1985) ("Believing that the Town's proposed placement of Michael at the Pine Glen School was inappropriate in light of Michael's needs, Mr. Panico enrolled Michael in the Carroll School in mid-August at his own expense."); *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 517-18 (6th Cir. 2003) (parents removed child from Heritage Elementary, a public school, and placed child at Medina Christian Academy, a private sectarian school); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 761 (6th Cir. 2001) (parents removed child from public school, rejected

private placement proposed in IEP, and enrolled child in different private school); *Tucker v. Colloway County Bd. of Ed.*, 136 F.3d 495, 498 (6th Cir. 1998) (parents removed child from Calloway County public school and placed child at the Learning and Cognitive Development Center, a private school in Boston).

The IDEA's "'stay-put' provision . . . requires a child to remain in his or her 'then-current educational placement' during the pendency of an IDEA hearing." *Schaffer v. Weast*, ___ U.S. ___, 2005 WL 3028015, *6 (Nov. 14, 2005) (citing 20 U.S.C. § 1415(j)); *see also* 34 C.F.R. § 300.514 ("[D]uring the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement."). For purposes of the IDEA's "stay put provision, the current educational placement is typically the placement described in the child's most recently implemented IEP." *Johnson ex rel. Johnson v. Special Educ. Hr'g Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) (citing *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990)). The parties agree, and the district court found, that the most recently implemented IEP was the October 9, 2002 to June 5, 2003, IEP ("2002-03 IEP"). (Winkelman Br. at 3; Parma Br. at 20; R. 33 Jan. 11, 2005 Order at 5; *see also generally* R. 6 Mot. in Opp. to Mot. for TRO, Ex. 9.) This IEP provided that Jacob's placement from October 9, 2002, to June 5, 2003, and from July 1 to July 31, 2003, would be at Achievement Centers for Children. (*See* R. 6 Mot. in Opp. to Mot. for TRO, Ex. 9, at 5.) Because no subsequent IEPs were implemented, Jacob's "then-current educational placement" for the purposes of the IDEA's stay-put provision is

the 2002-03 IEP. *See Johnson*, 287 F.3d at 1180; *see also Spillsbury v. Dist. of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004); *accord Laster*, 2005 WL 2429748 at *4.

Unlike the "unilateral placement" scenarios cited above, in all of which the disabled children's "then-current educational placement" remained available but the parents chose to place their children at a different school, here Jacob's "then-current educational placement" became unavailable to him on August 27, 2003 – the first day of school at ACC for the 2003-04 school-year.[2] Indeed, IHO

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[2] Appellee argues that this was not the case. Specifically, Appellee asserts that ACC "was willing to educate Jacob." (Parma Br. at 5.) This assertion is based on a September 14, 2004, affidavit from Cuyahoga County Education Service Center Special Education Supervisor Kate Foley, in which she stated that

> [t]he Achievement Center was prepared to abide by the hearing officer's order and educate Jacob at the Achievement Center for the 2003-04 school year. To do so, the Achievement Center planned to work with the Parma City School District. . . . Although various plans were discussed, nothing was finalized. . . .

(R. 15 Mot. Strike, Ex. 4, at 1-2.)

While this may have *eventually* become true – Ms. Foley's affidavit was prepared in September 2004, which was *over one year after* Jacob was supposed to begin his 2003-04 stay-put placement at ACC – Appellee has provided no evidence that it had taken efforts to ensure that Jacob could begin the 2003-04 school year at ACC. Nor could Appellee provide such evidence, because the record establishes (1) that, as of August 14, 2003 – approximately two weeks before the beginning of the 2003-04 school year – ACC had stated that it could not educate Jacob for the 2003-04 school-year and (2) that, as of October 27, 2003, ACC could still not educate Jacob for the 2003-04 school-year.

In particular, Judith Hudgins, the District's Special Education Supervisor acknowledged as much in an August 14, 2003, affidavit, where she stated that she

> recently spoke with an administrator at the Achievement Center, Kate Foley, regarding whether Jacob could attend the Achievement Center for another school year. *Ms. Foley informed me that*

(Continued on following page)

Freda predicted that this might happen in her August 27, 2003, Stay Put Order, (R. 15 Mot. Strike, Ex. 3, at 5).[3] Nonetheless, Appellee did not make any *timely* arrangements for Jacob to remain at ACC. *See supra* note 2. And, as both IHO Hagen in her June 2, 2004, Due Process decision, and the district court in its January 11, 2005, decision recognized, absent timely efforts by Appellee to enable Jacob to attend ACC for the 2003-04 school year, Appellants were precluded from sending Jacob there. (*See* Compl., Ex. 3, at 11 n.3 ("[B]ecause the Achievement Center does not serve six-year-olds, and Jacob had completed the preschool curriculum. . . . it is questionable whether parents could have complied with the stay-put order."); R. 33 Jan. 11, 2005, Order at 5 ("Here, it is undisputed that Jacob's most recent IEP placement was at

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because Jacob has turned six years old and is a school-age child, he cannot attend the preschool.

(R. 15 Mot. Strike, Ex. 5, at 12 (emphasis added).) ACC's position was the same on October 27, 2003 – two months after the beginning of the 2003-04 school year, when Ms. Foley testified before the Impartial Hearing Officer ("IHO") that "Achievement Center doesn't have anything post kindergarten. . . . Only the preschool." (R. 22 Admin. Record No. 3, K. Foley at TR 356.) This evidence establishes that ACC, Jacob's "then-current educational placement" was unavailable to him at the beginning of the 2003-04 school-year, and Appellee has provided no compelling evidence to rebut it. Moreover, should the Court desire direct evidence that Jacob was *refused* enrollment by ACC at the beginning of the 2003-04 school-year, Appellants will be able to provide such evidence to the district court on remand.

[3] IHO Freda's order stated, "Stay put is effective for the pendency of due process, in most instances through appeals at the district court level. The time frame involved in the appeal process is frequently quite lengthy. . . . However, the Achievement Center will not be addressing 'kindergarten services', and it is entirely possible that, in the future – perhaps as soon as five or six months – the parents or the school district may conclude such placement is no longer appropriate." (R. 15 Mot. to Strike, Ex. 3, at 5).

Achievement Center. Moreover, it is undisputed that Achievement Center was the operative placement when the dispute first arose. However, given the unique facts of this case, placing Jacob at Achievement School would be an absurd and potentially harmful result.")).[4] Nor did Appellee contact Appellants and offer them an alternative placement for Jacob – such as offering for Jacob to attend Parma's kindergarten program – during the first week of the 2003-04 school-year.[5]

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[4] Appellee spends considerable time discussing various decisions of the IHO, the SLRO, and the district court from February 25, 2004, to January 11, 2005. (Parma Br. at 9-14.) Appellee champions these decisions' findings that Parma provided Jacob with a FAPE. That procedural history is certainly interesting in an academic sense and will be relevant to this Court's resolution of the related appeal (Case No. 05-3886) which actually involves the issue whether Parma's proposed 2003-04 IEP provided Jacob with a FAPE and which this Court declined to consolidate with this appeal. (July 26, 2005, Order.) But that procedural history and those findings are *entirely irrelevant* to the instant appeal, which concerns only whether the district court erroneously determined that Jacob was not entitled to stay-put placement at Monarch. Stay-put proceedings and judicial review of FAPE findings are entirely distinct, and this Court should not be confused or misled by the District's creative advocacy into amalgamating the two inquiries. Moreover, any analysis of those decisions in this appeal would amount to an advisory opinion as to how this Court should evaluate the 05-3886 appeal.

[5] Parma's 2003 kindergarten school-year began on September 2, 2003, *see* http://www.parmacityschools.org/calendar/index.asp?DateShow 09/02/2003, with teachers reporting for work on August 27, 2003, *see* http://www.parmacityschools.org/calendar/index.asp?DateShow=08/27/2003, and various orientation activities for kindergarten parents and students taking place on August 28 and 29, 2003, *see* http://www.parmacityschools.org/calendar/index.asp?DateShow=08/28/2003; http://www.parmacityschools.org/calendar/index.asp?DateShow=08/29/2003. Parma's "calendar" webpage was last visited and all dates were verified by counsel on November 8, 2005. Because these dates are "capable of accurate and ready determination by resort to sources whose accuracy

(Continued on following page)

It is well-settled that "if a child's then-current educational placement is not available, the *school system* must provide the student with placement in a similar program during the pendency of administrative and judicial proceedings." *Laster,* 2005 WL 2429748, at 3 (citing *Knight v. Dist. of Columbia*, 877 F.2d 1025, 1029 (D.C. Cir. 1989); *McKenzie v. Smith*, 771 F.2d 1527, 1533 (D.C.Cir.1985); *Block v. Dist. of Columbia*, 748 F. Supp. 891, 898 n.9 (D.D.C. 1990)). By failing to timely ensure that Jacob could enroll at ACC, or alternatively, timely offering Appellants a kindergarten placement for Jacob for the 2003-04 school-year, Appellee left Appellants with no choice but to find a suitable substitute placement for ACC. Indeed, had Appellants failed to do so, Appellants would have been in violation of Ohio law, which requires that "[e]very parent of any child of compulsory school age . . . must send such child to a school or a special education program . . . for the full time the school or program attended is in session. . . . Such attendance must begin within the first week of the school term."[6] Ohio Rev. Code § 3321.04. Monarch School, where Appellants took Jacob when ACC became unavailable and Appellee failed to offer Jacob a place in Appellee's kindergarten program for the

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cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them. Moreover, this Court has repeatedly taken "an expansive view" of judicial notice in IDEA cases. *See, e.g., Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 850 (6th Cir. 2004).

[6] Per § 3321.01, Jacob was "of compulsory school age" for the 2003-04 school-year because he was six years old. *See* Ohio Rev. Code § 3321.01 ("A child between six and eighteen years of age is 'of compulsory school age' for the purpose of sections 3321.01 to 3321.13 of the Revised Code.").

2003-04 school-year and where Jacob is currently enrolled,[7] was and is the appropriate substitute for ACC because, as the record amply demonstrates, Monarch's provision of services to Jacob has been nearly identical to the services agreed to under the 2002-03 IEP. (*See* R. 22 Admin. Record No. 5, D. Mandell at TR 215 ("We are following the present IEP. . . . [t]he IEP he had from the Achievement Center.").

For these reasons, Appellants respectfully submit that the district court erred by not designating Monarch as Jacob's stay put placement. Accordingly, this Court should either reverse or vacate and remand with instructions for further factual development the district court's August 24, 2004, order. Any ruling from this Court to the contrary would reward Appellee for its failure to comply with IHO Freda's August 27, 2003, stay-put order and grant Appellee a windfall for doing so.

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[7] Appellants take exception to the District's repeated assertions that "[t]hroughout the district court proceedings, the Winkelmans have not sent Jacob to school." (Parma Br. at 11; *see also id.* ("[T]he Winkelmans have chosen not to re-enroll Jacob at Pleasant Valley, complete the required home schooling paperwork or enroll him) at a private school. . . . [T]hey have opted to keep Jacob out of school. . . .").) These assertions are (1) irrelevant to the issue presently before the Court, (2) not supported by the District with citations to the record, and (3) calculated to prejudice this Court against the Winkelmans and invite the Court to conclude that the Winkelmans are irresponsible parents. Moreover, they are also inaccurate. Attached as Exhibit "C" to the Winkelmans' January 3, 2005, Motion for Injunction Pending Appeal filed with this Court in this appeal was a December 13, 2004, letter from the Director of Monarch School, Debra Mandell, indicating that Jacob is enrolled at Monarch school and. . . . [h]is enrollment will continue pending the December 17th conference with Judge Manos." (Jan. 3, 2005, Mot. Inj., Ex. C.)

Appellants request oral argument and, should the Court find that it desires further briefing on any of the issues set forth here or in any other brief filed in this appeal, Appellants would be happy to provide further briefing.

Respectfully submitted,

/s/ Jean-Claude André
Jean-Claude André

PROOF OF SERVICE BY U.S. MAIL, FACSIMILE, AND EMAIL

I am a citizen of the United States and a member of the bar of this Court. I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 2602 Cardiff Ave., Los Angeles, California 90034. On November 15, 2005, I served a copy of Plaintiffs-Appellants' attached

SUPPLEMENTAL LETTER BRIEF

on counsel for Defendant-Appellee as listed below:

Christina H. Peer, Esq.
Christine M. Tomko Cossler, Esq.
Squire, Sanders & Dempsey
127 Public Square
Suite 4900 Key Tower
Cleveland, OH 44114-1304
Facsimile: (216) 479-8795
Email: cpeer@ssd.com

Service was effected by (1) putting a true and correct copy of the above-described document in a sealed envelope addressed to counsel for Defendant-Appellee, with postage fully prepaid, and placing the envelope for collection and

mailing today with the United States Postal Service; (2) faxing a true and correct copy of the above-described document to counsel for Defendant-Appellee; and (3) emailing a true and correct .PDF copy of the above-described document to counsel for Defendant-Appellee.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on November 15, 2005, at Los Angeles, California.

/s/ Jean-Claude André
Jean-Claude André

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN,	Case No. 05-3886
Plaintiffs-Appellants	**APPELLEE'S MOTION TO DISMISS**
v.	
PARMA CITY SCHOOL DISTRICT,	
Defendant-Appellee.	

Defendant-Appellee Parma City School District Board of Education, ("Parma" or the "District") hereby moves for dismissal of Plaintiffs-Appellants Jeff and Sandee Winkelman's ("the Winkelmans") above-captioned appeal unless the Winkelmans obtain counsel. As non-attorneys, the Winkelmans may not represent their child *pro se* in federal court. Therefore, Parma requests that this Court afford the Winkelmans a reasonable time to obtain counsel subject to dismissal of their appeal with prejudice if they fail to do so. A Memorandum of Law in support of the District's Motion is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ Christine Tomko Cossler
Christina Henagan Peer (0071579)
CPeer@ssd.com

Christine Tomko Cossler (0075340)
CCossler@ssd.com
SQUIRE, SANDERS & DEMPSEY, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 Telephone
(216) 479-8795 Facsimile
Attorneys for Defendant-Appellee
Parma City School District Board
of Education

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN, Plaintiffs-Appellants v. PARMA CITY SCHOOL DISTRICT, Defendant-Appellee.	Case No. 05-3886 **APPELLEE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

It is axiomatic that a non-attorney may not represent another person's legal interests in court. Recently, this Court found that this prohibition extends to parents' *pro se* representation of their children in proceedings arising under the Individuals with Disabilities in Education Act

("IDEA"). Appellants Jeff and Sandee Winkelman ("the Winkelmans") are non-attorneys who are representing the legal interests of their son, Jacob, *pro se* in the above-captioned IDEA matter. Consequently, Appellee Parma City School District Board of Education ("the District" or "Parma") asks this Court to require the Winkelmans to obtain counsel subject to dismissal of their appeal with prejudice if they do not obtain counsel within a reasonable time.

II. BRIEF STATEMENT OF FACTS

This case arises from a dispute concerning special education services under the IDEA. On June 5, 2003, the Winkelmans filed a request for due process, alleging the Individualized Education Plan ("IEP") offered by the District did not offer Jacob a free appropriate public education ("FAPE"). When the parties could not reach an agreement regarding Jacob's stay-put placement during the pendency of the due process hearing, the dispute was submitted to the Impartial Hearing Officer (IHO) for resolution. The IHO decided Jacob's stay-put placement was the Achievement Center for Children ("Achievement Center"). However, Jacob did not attend the Achievement Center during the 2003-04 school year because the Winkelmans unilaterally placed him at a private school, Monarch School, prior to the start of the school year.

A four day due process hearing was held and, on February 25, 2004, the IHO issued a written decision, finding the program offered by the District provided Jacob with a FAPE. The Winkelmans appealed this decision to a State Level Review Officer ("SLRO"). After reviewing the extensive record, on June 2, 2004, SLRO Hagan concluded

that the IHO did not err in finding the District offered Jacob a FAPE. On July 15, 2004, the Winkelmans, *pro se*,[1] appealed the SLRO's decision to the U.S. District Court for the Northern District of Ohio.

On August 23, 2004, the Winkelmans filed a Motion for Temporary Restraining Order asking the Court to order Monarch School as Jacob's stay-put placement during the pendency of the court proceedings. The District Court denied the Winkelmans' motion on August 24, 2004. The Winkelmans subsequently filed a Motion for Reconsideration which was also denied.[2] In March 2005, the parties briefed the substantive merits of the case and filed cross-motions for judgment on the administrative record with the District Court. With the cross-motions, the Winkelmans sought reversal of the SLRO's decision and reimbursement for educating Jacob at Monarch School while Parma sought affirmance of the SLRO's decision in its entirety.

On June 2, 2005, Judge Manos denied the Winkelmans' Motion for Judgment on the Administrative Record and granted the District's Motion for Judgment on the Administrative Record. Specifically, Judge Manos found that the state appointed hearing officers did not err in

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[1] The Winkelmans later obtained counsel and were represented by counsel at the time of the submission of the briefs on the merits as well as at the time Judge Manos's issued his decision on the merits.

[2] While their Motion for Reconsideration was pending, the Winkelmans filed an interlocutory appeal of the District Court's denial of their request for an injunction placing their son in a private school rather than Parma's proposed educational placement. This appeal is still pending before this Court as Case No. 04-4159. A similar motion to dismiss based on the Winkelmans' *pro se* representation is also pending before this Court in Case No. 04-4159.

determining that Parma had offered Jacob a FAPE. Judge Manos upheld these decisions and denied the Winkelmans' request for reimbursement for Jacob's unilateral placement at a private school.

On July 1, 2005, the Winkelmans, proceeding *pro se,* filed the instant appeal of Judge Manos' June 2, 2005 decision.

III. LAW AND ARGUMENT

A. THE WINKELMANS CANNOT REPRESENT THEIR CHILD *PRO SE* IN FEDERAL COURT UNDER THE IDEA.

It is well settled that a non-attorney may not represent the interests of another in court. *Heldt v. Nicholson,* 2000 U.S. App. LEXIS 21246, *4 (6th Cir. Aug. 10, 2000) ("That a non-lawyer may not represent another person in court is a venerable common law rule based on the strong state interest in regulating the practice of law") (attached) *citing Collinsgru v. Palmyra Bd. of Educ.,* 161 F.3d 225 (3rd Cir. 1998). This prohibition extends to non-lawyer parents, such as the Winkelmans, representing their children in court proceedings. *See Shepherd v. Wellman,* 313 F.3d 963, 970-71 (6th Cir. 2002); *Rawlings v. Littleton,* 1994 U.S. App. LEXIS 9703 (6th Cir. Apr. 28, 1994) (attached) *affirming Rawlings v. Littleton,* No. 92-00094 (W.D. Ky. July 8, 1992) (holding that a parent who is not an attorney could not represent the interests of her minor children). As this Court explained, "[P]arents cannot appear pro se on behalf of their minor children because a minor's personal cause of action is her own and does not belong to her parent or representative." *Shepherd,* 313

F.3d at 970-71 (citing *Cheung v. Young Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990)).

Recently, this Court held that the prohibition on non-attorney parents representing the interests of their children also extends to a court proceeding arising under the IDEA. *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005). In concluding that non-lawyer parents may not represent their child in court in an action brought under the IDEA, the *Cavanaugh* Court found that neither Federal Rule of Civil Procedure 17 nor the IDEA give parents such a right. *Id.* at *4-8. The *Cardinal* Court also expressly rejected the argument that the IDEA confers joint rights on both children and their parents, reasoning "the intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual." *Id.* at *8 (citations omitted). Accordingly, the *Cardinal* Court found:

> the right of disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents. Therefore, ***any right on which the [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon the [parents'] proceeding, through counsel, with their appeal on [their child's] behalf.***

Id. at *10-11. The *Cavanaugh* Court provided the family with an opportunity to obtain counsel and stated that failure to do so would result in the dismissal of their appeal.

Based on the above reasoning, this Court should find that the Winkelmans may not proceed *pro se* in their instant appeal under the IDEA but instead must obtain counsel.

IV. CONCLUSION

For the foregoing reasons, the District respectfully requests that this Court give the Winkelmans a reasonable time to obtain counsel and dismiss their appeal with prejudice if they fail to do so.

Respectfully submitted,

/s/ Christine Tomko Cossler
Christina Henagan Peer (0071579)
CPeer@ssd.com
Christine Tomko Cossler (0075340)
CCossler@ssd.com
SQUIRE, SANDERS & DEMPSEY, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 Telephone
(216) 479-8795 Facsimile
Attorneys for Defendant
Parma City School District
Board of Education

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2005, a copy of the foregoing Appellee's Motion to Dismiss and Memorandum in Support was sent by U.S. mail to Mr. and Mrs. Jeff Winkelman, 1853 Jacqueline Drive, Parma, Ohio 44134.

/s/ Christine Tomko Cossler
One of the Attorneys for
Defendant-Appellee Parma
City School District

2000 U.S. App. LEXIS 21246

LINDA ANN HELDT; DOUGLAS DWIGHT BENNETT, Plaintiffs-Appellants, v. JULIE A. NICHOLSON; RALPH H. NELSON; STATE BAR OF MICHIGAN; LAWYERS POLITICAL ACTION COMMITTEE; ALFRED M. BUTZBAUGH; THOMAS J. RYAN; BRUCE W. NECKERS; REGINALD M. TURNER, JR.; THOMAS K. BYERLEY; MICHIGAN SECRETARY OF STATE CANDICE S. MILLER, Defendants-Appellees.

No. 99-2120

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

August 10, 2000, Filed

COUNSEL: LINDA ANN HELDT, Plaintiff-Appellant, Pro se, Washington, MI.

DOUGLAS DWIGHT BENNETT, Plaintiff-Appellant, Pro se, Flat Rock, MI.

For JULIE A. NICHOLSON, RALPH H. NELSON, Defendants-Appellees: William G. Pierson, Oakland County Prosecutor's Office, Pontiac, MI.

For STATE BAR OF MICHIGAN, MICHIGAN SECRETARY OF STATE, CANDICE S. MILLER, Defendants-Appellees: James T. Farrell, Office of the Attorney General, Lansing, MI.

For LAWYERS POLITICAL ACTION COMMITTEE, Defendant-Appellee: David C. Coey, Dickinson, Wright, Moon, Van Dusen & Freeman, Lansing, MI.

For ALFRED M. BUTZBAUGH, THOMAS J. RYAN, BRUCE W. NECKERS, REGINALD M. TURNER, JR.,

THOMAS K. BYERLEY, Defendants-Appellees: Victoria V. Kremski, State Bar of Michigan, Lansing, MI.

JUDGES: Before: SUHRHEINRICH and DAUGHTREY, Circuit Judges; COLLIER, District Judge.*

OPINION: ORDER

Linda Ann Heldt and Douglas Dwight Bennett, Michigan residents, appeal pro se a district court order dismissing their alleged civil rights action for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, Heldt and Bennett filed this action against two Michigan state court judges, the state bar association and several of its officers, the Lawyers' Political Action Committee, and the Michigan Secretary of State. In a complaint over 45 pages in length, the only intelligible claim raised was that the two state court judges named as defendants had denied them their "right" to have Bennett represent Heldt in state court, although Bennett is not a licensed attorney.

The several defendants filed motions to dismiss, and the district court issued an order to show cause why the complaint should not be dismissed. Heldt and Bennett filed responses. The district court then dismissed the complaint for failure to state a claim, concluding that the

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* The Honorable Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

issue raised had recently been decided in another appeal in this court. *See Neilson v. State of Michigan*, 1999 U.S. App. LEXIS 8698, No. 98-1317, 1999 WL 313854 (6th Cir. May 3, 1999), *cert. denied*, 145 L. Ed. 2d 318, 120 S. Ct. 408 (1999). The district court also invited the defendants to submit statements of their costs and attorney fees for consideration of the imposition of sanctions.

On appeal, Heldt and Bennett appear to be reasserting their original claim. Some of the defendants have requested the imposition of sanctions pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38.

Upon review, we conclude that this complaint was properly dismissed for failure to state a claim, as Heldt and Bennett could prove no facts which would entitle them to relief. *See Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993).

The argument that lay individuals have a constitutional right to be represented by and to represent other lay individuals in court has been consistently rejected by this court every time it has been raised by Bennett in his many appeals. In addition to the case relied on by the district court, Bennett has had this argument rejected in *Neilson v. State of Michigan*, 1999 U.S. App. LEXIS 23311, No. 98-1754, 1999 WL 776169 (6th Cir. Sept. 20, 1999), *Farmer v. City of Hazel Park*, 1996 U.S. App. LEXIS 16865, No. 95-1928, 1996 WL 287305 (6th Cir. May 29, 1996), and *Bennett v. Batchik*, 52 F.3d 324, 1995 WL 236679 (6th Cir. 1995). As to plaintiff Bennett this argument is barred by issue preclusion. *See N.L.R.B. v. Kentucky May Coal Co.*, 89 F. 3d 1235, 1239 (6th Cir. 1996); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). As to plaintiff Heldt, we are barred by stare decisis.

Moreover, the grounds previously cited for rejection of this argument remain valid. That a non-lawyer may not represent another person in court is a venerable common law rule based on the strong state interest in regulating the practice of law. *See Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231-32 (3rd Cir. 1998) (citing cases). It also remains true that the named defendants would be immune from the imposition of monetary damages due to absolute, Eleventh Amendment, and qualified immunity.

For the above reasons, the district court's order dismissing this complaint is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit. Due to the frivolity of this appeal, the defendants are invited to submit bills of costs and attorney fees for the panel's consideration. Heldt and Bennett may then file a response. *See* Fed. R. App. P. 38; 28 U.S.C. § 1912.

1994 U.S. App. LEXIS 9703

LINDA RAWLINGS, Plaintiff-Appellant, v. SCOTT LITTLETON, M.D.; LONNIE LYLES; PEGGY NUNN; MARY KUCHUNBAUM; DAUN ANDREWS; RANDY KIMBROUGH; PAMELA BEATY; RICK DORSEY; JUDY GLASS; PAT GUTHRIE; DENNIS MINIX; MARY ROSS; ERNIE SMALL; BUDDY TURNER; MARGARET FREEMAN; THOMAS R. LEWIS, Judge; BILL HAYNES; MARGARET YOUNG; JO ANN COLEMAN; BILL ANDREWS; MICHAEL MOORE; GARY EHLING; MADENA BASHAM; KENNETH ROYSE; THERESA NELSON; BOB RATHBAUM; BECKY MILLER; JOHNNY WATTS; JOHN HOYLE; MARGARET ROBBINS; JOHN CHILDRESS; JO ANN FARINA; GARY DRAKE; CHARLES BAKER; SUZANNE PASH; CATHY REEVES, Defendants-Appellees.

No. 93-5223

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

April 28, 1994, Filed

JUDGES: BEFORE: MERRITT, Chief Judge; KENNEDY and NELSON, Circuit Judges.

OPINION: ORDER

Linda Rawlings appeals a district court order dismissing her civil rights action filed pursuant to 42 U.S.C. § 1983. The defendants have filed various motions to dismiss. Rawlings has filed a motion for a restraining order, and the defendants have responded. Rawlings has also filed a motion to supplement the record and a motion to produce records. The defendants also request attorney's fees for the expense of responding to Rawling's motion to supplement the record. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Rawlings originally filed six complaints, three of which also named Rawlings's son as a plaintiff. The complaints against numerous defendants, which the district court consolidated, arose out of court proceedings resulting in the removal of Rawlings's son from her home and his placement in the Rivendell Youth Center and the Dessie Scott Children's Home in Pine Ridge, Kentucky. In a typewritten statement of claim attached to each of the six separate complaints, Rawlings alleged that she has not been allowed to visit her son for almost one year and that she has not been provided family therapy that would prepare her for her son's return to her home; that Social

Services has hidden wrongdoings by Dessie Scott Children's Home; and that her son has had medical problems, has been denied medical attention, and has lost a total of 57 pounds while in the custody of Social Services. Rawlings alleged additional claims such as medical malpractice, defamation of character, blackmail, lost wages, assault charges on behalf of her son, and filing false incident reports. She sought injunctive and monetary relief.

On July 8, 1992, the district court dismissed the allegations on behalf of Rawlings's son. The court held that a parent who is not an attorney could not represent the interests of her minor children. *See Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam); *Lawson v. Edwardsburg Public School*, 751 F. Supp. 1257, 1258 (W.D. Mich. 1990); *Pierce v. Stinson*, 493 F. Supp. 609, 611 (E.D. Tenn. 1979). The court also ordered Rawlings to amend her complaint to allege facts sufficient to state a legal theory of recovery cognizable under § 1983.

Rawlings filed an amended complaint on July 24, 1992, and the defendants filed various motions to dismiss. In separate memorandum opinions and orders entered December 21, 1992, and February 3, 1993, the district court dismissed the complaint against the various defendants for failure to state a claim upon which relief may be granted.

Initially, we address the defendants' motions to dismiss Rawlings's appeal. First, contrary to the defendants' claim, Rawlings properly perfected an appeal. A mistake in designating the judgment appealed from is not always fatal as long as the intent to appeal from a specific ruling can be fairly inferred by probing the notice.

Sanabria v. United States, 437 U.S. 54, 57 n.21, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978). In this case, it can be fairly inferred that Rawlings intended to appeal the decision of the district court dismissing her case against all defendants. Accordingly, Rawlings properly perfected an appeal from the district court's decision in its entirety.

Second, contrary to the defendants' claim, the Sixth Circuit docket sheet reflects that Rawlings did file a motion to proceed in forma pauperis in the Sixth Circuit on March 1, 1993, well before the March 22, 1993, deadline. The motion to proceed in forma pauperis was denied in an order filed May 10, 1993, and Rawlings paid the filing fee on May 14, 1993. Thus, the defendants' claim on this point must fail.

We will only address the dismissal of Rawlings's claims. We need not address the purported claims asserted on Rawlings's son's behalf because we agree with the district court that Rawlings cannot represent the interests of her minor son in this case. The district court ruled that a parent who is not an attorney could not represent the interests of her minor children. We note that a parent, if appointed next friend, could sue on her minor child's behalf. *See* Fed. R. Civ. P. 17(c). However, there is no indication from the record that Rawlings was appointed next friend in this case.

Upon review, we conclude that the dismissal of Rawlings's suit was proper as Rawlings undoubtedly can prove no set of facts in support of her claims that would entitle her to relief. *Meador v. Cabinet for Human Resources*, 902 F. 2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867, 112 L. Ed. 2d 145, 111 S. Ct. 182 (1990); *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F. 2d 882, 885 (6th

Cir. 1990). A pleading which sets forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts underlying the claim, the plaintiff must provide sufficient allegations to give the defendants fair notice of the claims against them. *See Leatherman v. Tarrant County Narcotics*, 122 L. Ed. 2d 517, 113 S. Ct. 1160, 1163 (1993). Here, Rawlings failed to set forth any allegations in her complaints to support a legal theory of recovery cognizable under § 1983.

Accordingly, the motions to dismiss are denied, the motion for injunctive relief is denied, the request for attorney's fees is denied, the motion to supplement the record is denied, the motion to produce records is denied, and the district court's order dismissing Rawling's six complaints is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACOB Winkelman, a minor, by and through his parents and Legal Guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN, **Plaintiffs-Appellants,** **-v-** **PARMA CITY SCHOOL DISTRICT,** **Defendant-Appellee.**	**CASE NO. 05-3886** **PLAINTIFFS-APPELLANTS MEMORANDUM IN OPPOSITION TO DEFENDANTS-APPELLEE MOTION TO DISMISS**

Now come Plaintiffs-Appellants, Jacob Winkelman, a minor, ("J.W.") by and through his parents and legal guardians, Jeff and Sandee Winkelman, and Jeff and Sandee Winkelman, ("the Winkelmans") and hereby submits their memorandum in opposition to Defendants-Appellees Parma City School District ("Parma") Motion to Dismiss.

INTRODUCTION

Parma has filed a motion on July 12, 2005, to dismiss this legal action because the Winkelmans cannot afford to hire an ɛttorney, and therefore, have been forced to proceed in *pro se* in order to protect their own rights and the rights of their child under the Individuals with Disabilities

Education Act (IDEA). The Winkelmans have exhausted their finances and are unable to continue with affording an attorney, as we do not have unlimited public funds to utilize to pay an attorney as Parma is allowed with paying their attorneys. It should be noted that this appeal was filed on July 1, 2005, and that this Court has already permitted the Winkelmans to proceed *pro se* over the objections of Parma and briefs have been filed by both sides. See Order issued November 4, 2004, footnote one (1).

On July 1, 2005, the Winkelmans filed a notice of appeal to the Sixth Circuit Court of Appeals for the purpose of appealing Judge Manos' decision denying the Winkelmans Motion for Judgment on the Administrative Record on June 2, 2005.

LAW AND ARGUMENT

It is respectfully submitted that, because the Court has already permitted the Winkelmans to proceed in pro se, Parma is collaterally estopped from relitigating this issue. Parma must allow the panel to decide the issue on the merits.

The Winkelmans acknowledge that there have been decisions on both sides of this issue along with a decision with regards to the Cavanaugh's, which the merits of this appeal can be distinguished, very different from that of

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[1] The issue of whether Jeff and Sandee Winkelman, acting pro se, may represent the interests of their minor child in the appeal is referred to the panel to be assigned to hear the appeal on the merits. ENTERED BY ORDER OF THE COURT

Cavanaugh. While Parma attempts to belittle the Winkelmans for not being as legally savvy as their team of high priced lawyers, Parma is now instructing this court to order the Winkelmans to do what Parma thinks the court should do, without a decision from this court and by predetermining the decision of the panel before the panel reaches the merits of the appeal, as the court previously instructed in its order of Nov.4, 2004.

Congress just recently reauthorized the IDEA 2004 leaving the procedural provisions unchanged as to the rights of parents to represent their handicapped children's interests in IDEA cases. Moreover, both chambers of Congress have passed similar bills reauthorizing the IDEA, in May 2004. During the course of said reauthorizations, Congress had opportunities to specifically write in a provision prohibiting parents from proceeding *pro se* on judicial reviews of IDEA administrative proceedings. Congress chose not to include such a provision even though school administration lobbies had specifically asked for such to be included in both reauthorizations. The conspicuous absence of such a provision clearly indicates a legislative intent to permit parents to continue to pursue judicial reviews of IDEA administrative proceedings in *pro se*.

Moreover, the Winkelmans respectfully submit that the recent reauthorization of IDEA 2004 effective July 1, 2005, on this issue, clearly indicates a judicial recognition of the Congressional intent to allow parents to proceed *pro se* in IDEA cases. (Exhibit A)

The Winkelmans respectfully submit that the July 1, 2005, very recent reauthorization of IDEA 2004, and a wide range of other well reasoned federal cases clearly

captures the legislative intent of the IDEA. The Winkelmans therefore ask this Honorable Court to reevaluate the July 1, 2005 reauthorization of IDEA 2004 as to the Congressional intent regarding parents being permitted to proceed *pro se.*

Wherefore, the Winkelmans respectfully request this Honorable Court deny Parma's motion to dismiss.

Respectfully submitted,

/s/ Jeff Winkelman
Jeff Winkelman
Appearing pro se

/s/ Sandee Winkelman
Sandee Winkelman
Appearing pro se

1853 Jacqueline Drive
Parma, Ohio 44134

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion have been sent by regular U. S. mail to Christina Henagen Peer, Esq., Squire, Sanders and Dempsey L.L.P., 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114-1304, on this 20 day of July, 2005.

/s/ Sandee Winkelman
Sandee Winkelman

No. 04-4159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB Winkelman, a minor, by and through his parents and Legal Guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN,

Plaintiffs-Appellants,

v.

PARMA CITY SCHOOL DISTRICT,

Defendant-Appellee.

ORDER

(Filed Nov. 4, 2004)

Before: MERRITT, DAUGHTREY, and SUTTON, Circuit Judges.

The plaintiffs appeal the denial of their motion for a stay-put injunction in this action under the Individuals with Disabilities and Education Act ("IDEA"). They move for a stay and injunction pending appeal and also request an immediate, ex parte, temporary injunction pending consideration of their motion for an injunction pending appeal. The defendant opposes the motions for injunctive relief and moves to dismiss the appeal. The plaintiffs oppose the motion to dismiss.

The defendant moves to dismiss the appeal on several grounds. First, it argues that Jeff and Sandee Winkelman, as non-attorney parents, may not represent the interest of their minor child in federal court. Jeff and Sandee Winkelman may personally pursue their individual IDEA

claims in federal court. *See* 28 U.S.C. § 1654. This court has not addressed the question of whether parents may also personally pursue in federal court the IDEA claims of their minor children. There is a split in the circuits concerning whether parents, acting *pro* se, may enforce the substantive rights of their minor children in an IDEA action. *Compare Maroni v. Pemi-Baker Regional Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003) (permitting *pro se* representation), *with Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998). We will defer a ruling on this unsettled issue to the panel to be assigned to hear this appeal on the merits.

The defendant also moves to dismiss the appeal for lack of jurisdiction, arguing that the district court's order is not appealable and that the pendency of the plaintiffs' motion for reconsideration in the district court deprives this court of appellate jurisdiction. The district court's order denied the plaintiffs' request for an injunction setting forth the placement of the child, and is appealable under 28 U.S.C. § 1292(a)(1). *See, e.g., Wagner v. Board of Educ. of Montgomery County*, 335 F.3d 297 (4th Cir. 2003) (reviewing an IDEA stay-put preliminary injunction). The plaintiffs' motion for reconsideration was not filed within ten days of the entry of the order and does not affect the validity of the appeal. *See* Fed. R. App. P. 4(a)(4).

The plaintiffs seek an injunction pending appeal directing that the stay-put placement for the child be designated as the Achievement Center. They also request emergency temporary injunctive relief to the same effect. Fed. R. App. P. 8(a)(1) requires that a party first seek

injunctive relief pending appeal in the district court. Only if the district court declines to grant such relief or there is a showing that moving first in the district court would have been impracticable may a party move for a stay or injunction pending appeal in this court. Fed. R. App. P. 8(a)(2). The plaintiffs have not requested that the district court order a placement at the Achievement Center, and they cannot show that it would be impracticable to do so.

Therefore, the plaintiffs' motions for injunctive relief pending appeal are **DENIED** without prejudice to renewal, if necessary, following a ruling by the district court on an injunction pending appeal. The defendant's motion to dismiss for lack of jurisdiction is DENIED. The issue of whether Jeff and Sandee Winkelman, *acting pro se*, may represent the interests of their minor child in the appeal is referred to the panel to be assigned to hear the appeal on the merits.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green/JC
Clerk

H.R.1350

Individuals with Disabilities Education Improvement Act of 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

SEC. 302. EFFECTIVE DATES.

(a) Parts A, B, and C, and subpart 1 of part D –

(1) IN GENERAL – Except as provided in paragraph (2), parts A, B, and C, and subpart 1 of part D, of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on July 1, 2005.

(2) HIGHLY QUALIFIED DEFINITION – Subparagraph (A), and subparagraphs (C) through (F), of section 602(10) of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on the date of enactment of this Act for purposes of the Elementary and Secondary Education Act of 1965.

(b) SUBPARTS 2, 3, AND 4 OF PART D – Subparts 2, 3, and 4 of part D of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on the date of enactment of this Act.

(c) Education Sciences Reform Act of 2002 –

(1) NATIONAL CENTER FOR SPECIAL EDUCATION RESEARCH – Sections 175, 176, and 177 (other than section 177(c)) of the Education Sciences Reform Act of 2002, as enacted by section 201(a)(2) of this Act, shall take effect on the date of enactment of this Act.

(2) PLAN – Section 177(c) of the Education Sciences Reform Act of 2002, as enacted by section 201(a)(2) of this Act, shall take effect on October 1, 2005.

H.R.1350

Individuals with Disabilities Education Improvement Act of 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

'SEC. 615. PROCEDURAL SAFEGUARDS.

'(a) ESTABLISHMENT OF PROCEDURES – Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

'(b) TYPES OF PROCEDURES – The procedures required by this section shall include the following:

'(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

'(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of

the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of –

'(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

'(ii) an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)), the local educational agency shall appoint a surrogate in accordance with this paragraph.

'(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

'(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency –

'(A) proposes to initiate or change; or

'(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

'(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

'(5) An opportunity for mediation, in accordance with subsection (e).

'(6) An opportunity for any party to present a complaint –

'(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

'(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

'(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential) –

'(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

'(ii) that shall include –

'(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

'(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;

'(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

'(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

'(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

'(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

'(c) NOTIFICATION REQUIREMENTS –

'(1) CONTENT OF PRIOR WRITTEN NOTICE – The notice required by subsection (b)(3) shall include –

'(A) a description of the action proposed or refused by the agency;

'(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment,

record, or report the agency used as a basis for the proposed or refused action;

'(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

'(D) sources for parents to contact to obtain assistance in understanding the provisions of this part;

'(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

'(F) a description of the factors that are relevant to the agency's proposal or refusal.

'(2) DUE PROCESS COMPLAINT NOTICE –

'(A) COMPLAINT – The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

'(B) RESPONSE TO COMPLAINT –

'(i) LOCAL EDUCATIONAL AGENCY RESPONSE –

'(I) IN GENERAL – If the local educational agency has not sent a prior written notice to the parent

regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include –

'(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

'(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

'(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

'(dd) a description of the factors that are relevant to the agency's proposal or refusal.

'(II) SUFFICIENCY – A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

'(ii) OTHER PARTY RESPONSE – Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

'(C) TIMING – The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

'(D) DETERMINATION – Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

'(E) AMENDED COMPLAINT NOTICE–

'(i) IN GENERAL – A party may amend its due process complaint notice only if –

'(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

'(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

'(ii) APPLICABLE TIMELINE – The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

'(d) PROCEDURAL SAFEGUARDS NOTICE –

'(1) IN GENERAL –

'(A) COPY TO PARENTS – A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents –

'(i) upon initial referral or parental request for evaluation;

'(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

'(iii) upon request by a parent.

'(B) INTERNET WEB SITE – A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

'(2) CONTENTS – The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

'(A) independent educational evaluation;

'(B) prior written notice;

'(C) parental consent;

'(D) access to educational records;

'(E) the opportunity to present and resolve complaints, including –

'(i) the time period in which to make a complaint;

'(ii) the opportunity for the agency to resolve the complaint; and

'(iii) the availability of mediation;

'(F) the child's placement during pendency of due process proceedings;

'(G) procedures for students who are subject to placement in an interim alternative educational setting;

'(H) requirements for unilateral placement by parents of children in private schools at public expense;

'(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

'(J) State-level appeals (if applicable in that State);

'(K) civil actions, including the time period in which to file such actions; and

'(L) attorneys' fees.

'(e) MEDIATION –

'(1) IN GENERAL – Any State educational agency or local educational agency that receives assistance under this part shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a

complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

'(2) REQUIREMENTS – Such procedures shall meet the following requirements:

'(A) The procedures shall ensure that the mediation process –

'(i) is voluntary on the part of the parties;

'(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part; and

'(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

'(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY – A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

'(i) a parent training and information center or community parent resource center in the State established under section 671 or 672; or

'(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

'(C) LIST OF QUALIFIED MEDIATORS – The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

'(D) COSTS – The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

'(E) SCHEDULING AND LOCATION – Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

'(F) WRITTEN AGREEMENT – In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that –

'(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

'(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

'(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

'(G) MEDIATION DISCUSSIONS – Discussions that occur during the mediation process shall be confidential and may not be

used as evidence in any subsequent due process hearing or civil proceeding.

'(f) IMPARTIAL DUE PROCESS HEARING –

'(1) IN GENERAL –

'(A) HEARING – Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

'(B) RESOLUTION SESSION –

'(i) PRELIMINARY MEETING – Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint –

'(I) within 15 days of receiving notice of the parents' complaint;

'(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

'(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

'(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

'(ii) HEARING – If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part shall commence.

'(iii) WRITTEN SETTLEMENT AGREEMENT – In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is –

'(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

'(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

'(iv) REVIEW PERIOD – If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

'(2) DISCLOSURE OF EVALUATIONS AND RECOMMENDATIONS –

'(A) IN GENERAL – Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

* * *

Taken from Section 615(i) of H.R. 1350, as passed by the Senate 5/13/04.

(4) PARENTS REPRESENTING THEIR CHILDREN IN COURT – Subject to subsection (m), and notwithstanding any other provision of Federal law regarding attorney representation (including the Federal Rules of Civil Procedure), a parent of a child with a disability may represent the child in any action under this part in Federal or State court, without the assistance of an attorney.

Excerpt from Senate Report 108-185

Parents representing their children in civil actions

The statutory language of IDEA makes clear that a parent has a right to file a due process complaint and to have the

opportunity for a due process hearing. It is unquestioned that parents have the right to bring a complaint and participate in a due process hearing without an attorney.

However, there has been disagreement as to whether a parent may, in effect, 'represent' their child in a civil action that results from an appeal of a due process hearing. The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.

Both Federal and State laws generally prevent a non-attorney parent from representing his or her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child. Moreover, it is well-settled law that a minor is disqualified from representing himself or herself in a civil action.

A parent who does not have the financial resources to hire an attorney, but yet does not meet the financial need criteria for court-appointed counsel, or who cannot find an attorney to take their case on a contingency basis, has no ability to protect their child's interests if they are disallowed from going to court. This seems particularly unfair if a school district, rather than the parent, appeals a due process hearing decision to State or Federal court.

It makes little sense if the parents who are explicitly permitted to invoke administrative remedies and to exhaust them could not be parties for purposes of bringing suit. IDEA relies upon the central role played by parents in assuring that their child with a disability receives a free appropriate public education.

Based on current statutory language and on the rich legislative history emphasizing the importance of parental involvement, the committee believes that parents have a right to represent their child in court, without a lawyer, for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues. Therefore, the committee has amended section 615(i)(2) to clarify that a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney. The committee makes clear that this provision applies only to civil actions brought under IDEA as a result of an

* * *

H.R.1350

Individuals with Disabilities Education Improvement Act of 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

'(B) FAILURE TO DISCLOSE – A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

'(3) LIMITATIONS ON HEARING –

'(A) PERSON CONDUCTING HEARING – A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum –

'(i) not be –

'(I) an employee of the State educational agency or the local educational

agency involved in the education or care of the child; or

'(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

'(ii) possess knowledge of, and the ability to understand, the provisions of this title, Federal and State regulations pertaining to this title, and legal interpretations of this title by Federal and State courts;

'(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

'(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

'(B) SUBJECT MATTER OF HEARING – The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

'(C) TIMELINE FOR REQUESTING HEARING – A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.

'(D) EXCEPTIONS TO THE TIMELINE – The timeline described in subparagraph (C) shall not

apply to a parent if the parent was prevented from requesting the hearing due to –

'(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

'(ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

'(E) DECISION OF HEARING OFFICER –

'(i) IN GENERAL – Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

'(ii) PROCEDURAL ISSUES – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

'(I) impeded the child's right to a free appropriate public education;

'(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

'(III) caused a deprivation of educational benefits.

'(iii) RULE OF CONSTRUCTION – Nothing in this subparagraph shall be construed

to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

'(F) RULE OF CONSTRUCTION – Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

'(g) APPEAL –

'(1) IN GENERAL – If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

'(2) IMPARTIAL REVIEW AND INDEPENDENT DECISION – The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

'(h) SAFEGUARDS – Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded –

'(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

'(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

'(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

'(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which fmdings and decisions –

'(A) shall be made available to the public consistent with the requirements of section 617(b) (relating to the confidentiality of data, information, and records); and

'(B) shall be transmitted to the advisory panel established pursuant to section 612(a)(21).

'(i) ADMINISTRATIVE PROCEDURES –

'(1) IN GENERAL –

'(A) DECISION MADE IN HEARING – A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

'(B) DECISION MADE AT APPEAL – A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

'(2) RIGHT TO BRING CIVIL ACTION –

'(A) IN GENERAL – Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall

have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

'(B) LIMITATION – The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows.

'(C) ADDITIONAL REQUIREMENTS – In any action brought under this paragraph, the court –

'(i) shall receive the records of the administrative proceedings;

'(ii) shall hear additional evidence at the request of a party; and

'(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

'(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES –

'(A) IN GENERAL – The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

'(B) AWARD OF ATTORNEYS' FEES –

'(i) IN GENERAL – In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs –

'(I) to a prevailing party who is the parent of a child with a disability;

'(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

'(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

'(ii) RULE OF CONSTRUCTION – Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

'(C) DETERMINATION OF AMOUNT OF ATTORNEYS' FEES – Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

'(D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES –

'(i) IN GENERAL – Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

'(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

'(II) the offer is not accepted within 10 days; and

'(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

'(ii) IEP TEAM MEETINGS – Attorneys' fees may not be awarded relating

to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

'(iii) OPPORTUNITY TO RESOLVE COMPLAINTS – A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered –

'(I) a meeting convened as a result of an administrative hearing or judicial action; or

'(II) an administrative hearing or judicial action for purposes of this paragraph.

'(E) EXCEPTION TO PROHIBITION ON ATTORNEYS' FEES AND RELATED COSTS – Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

'(F) REDUCTION IN AMOUNT OF ATTORNEYS' FEES – Except as provided in subparagraph (G), whenever the court finds that –

'(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

'(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing

in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

'(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

'(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

'(G) EXCEPTION TO REDUCTION IN AMOUNT OF ATTORNEYS' FEES – The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

'(j) MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT – Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

'(k) PLACEMENT IN ALTERNATIVE EDUCATIONAL SETTING –

'(1) AUTHORITY OF SCHOOL PERSONNEL –

'(A) CASE-BY-CASE DETERMINATION – School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

'(B) AUTHORITY – School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

'(C) ADDITIONAL AUTHORITY – If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) although it may be provided in an interim alternative educational setting.

'(D) SERVICES – A child with a disability who is removed from the child's current

placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall –

'(i) continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

'(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

'(E) MANIFESTATION DETERMINATION –

'(i) IN GENERAL – Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –

'(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

'(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

'(ii) MANIFESTATION – If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

'(F) DETERMINATION THAT BEHAVIOR WAS A MANIFESTATION – If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall –

'(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

'(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a

behavioral intervention plan, and modify it, as necessary, to address the behavior; and

'(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

'(G) SPECIAL CIRCUMSTANCES – School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child –

'(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

'(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

'(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

'(H) NOTIFICATION – Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

'(2) DETERMINATION OF SETTING – The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1)

* * *

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACOB Winkelman, a minor, by and through his parents and Legal Guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN, Plaintiffs-Appellants, v. PARMA CITY SCHOOL DISTRICT, Defendant-Appellee.	) CASE NO. 05-3886)))) **APPELLEE'S REPLY TO APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**)))

I. INTRODUCTION.

Plaintiffs-Appellants Jeff and Sandee Winkelmans' ("the Winklemans") Opposition to the Defendant-Appellee Parma City School District Board of Education's ("Parma" or "District") motion to dismiss fails to overcome the fact that they may not proceed *pro se* with their appeal under the Individuals with Disabilities Education Act ("IDEA"). Instead, they misconstrue the binding effect of this Court's decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005) as well as the *Cavanaugh* court's rationale. Therefore, this Court should dismiss the Winkelmans' appeal with prejudice unless they obtain counsel within a reasonable time.

II. THE WINKELMANS OFFER NO COMPELLING LEGAL AUTHORITY TO OVERCOME THE FACT THAT THEY CANNOT REPRESENT THEIR CHILD PRO SE IN FEDERAL COURT UNDER THE IDEA.

As this Court recently found in *Cavanaugh v. Cardinal Local Sch. Dist.*, the well-settled prohibition on non-attorney parents representing the interests of their children in court extends to judicial proceedings arising under the IDEA. *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), *reh'g denied* 2005 U.S. App. LEXIS 8867 (June 15, 2005). Here, the *Cavanaugh* decision is directly on point and must be followed. The Winkelmans' assertion that the *Cavanaugh* decision is distinguishable because the "merits" of their appeal "are very different from that of Cavanaugh," (Opposition at 2), is misguided. The *Cavanaugh* court did not address the merits of the Cavanaughs' appeal but instead found that the language of the IDEA does not allow ***any*** non-lawyer parent to proceed *pro se* in IDEA judicial proceedings. *Id.* at *4-8.

Likewise, the Winkelmans' argument that the 2004 amendments to the IDEA require this panel to reach a different result than the *Cavanaugh* court is also unavailing. First, it is well-settled that "A panel of this court may not reverse a prior published decision of another panel. Only an en banc panel of the court may reverse a published decision." *Naturalite v. Ciarlo*, 22 Fed. Appx. 506, 507 (6th Cir. 2001) *citing* Sixth Circuit Rule 206(c).[1] Further, the reauthorized IDEA provides no basis to

[1] Moreover, the Cavanaughs requested a rehearing but their petition for rehearing was denied. *Cavanaugh v. Cardinal Local Sch. Dist.*, 2005 U.S. App. LEXIS 8867 (6th Cir. June 15, 2005).

overturn the *Cavanaugh* decision. The Winkelmans argue that this Court should reevaluate the *Cavanaugh* decision because the amended IDEA did not add an express provision preventing non-attorney parents from proceeding *pro se* in judicial proceedings. The Winkelmans, however, misconstrue the *Cavanaugh* court's rationale. In finding that non-lawyer parents may not represent their children in court actions under the IDEA, the *Cavanaugh* court reasoned:

> The Cavanaughs can point to no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court. ***To the contrary, the language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions. The IDEA explicitly grants parents the right to a due process hearing as part of the administrative proceedings provided for by the statute, and the regulations provide to the parents the right to present evidence and examine witnesses on behalf of the child in such a proceeding.*** 20 U.S.C. § 1415(f)(1); 34 C.F.R. § 303.422(b)(2). ***In stark contrast, the provision of the IDEA granting "[a]ny party aggrieved" access to the federal courts, 20 U.S. C§ 1415(i)(2)(A), makes no mention of parents whatsoever.*** Applying the canon of *expressio unius est exclusio alterius*, which says that the mention of one thing implies the exclusion of another, *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001), we conclude that the IDEA does not grant parents the right to represent their child in federal court.

Id. at *4-8 (emphasis added).

Significantly, as before, Section 1415 of the reauthorized IDEA still "makes no mention" of parents.[2] Notably, the procedural provisions of the reauthorized IDEA expressly grant non-attorney parents the right to proceed *pro se* at the ***administrative level*** while failing to grant non-attorney parents a corresponding right to proceed *pro se* in ***judicial proceedings.***[3] Indeed, as the Winkelmans correctly note, the reauthorized IDEA "le[ft] the procedural provisions ***unchanged*** as to the rights of parents to represent their handicapped children's interests in IDEA cases." (Opposition at 2) (emphasis added). Therefore, the amendments to the IDEA do not conflict with the *Cavanaugh* court's rationale and do not provide a basis to overturn the *Cavanaugh* decision.

III. CONCLUSION.

For the foregoing reasons, Defendant-Appellee, the Parma City School District Board of Education, respectfully requests that this Court give the Plaintiffs-Appellants Jeff and Sandee Winkelman a reasonable time to obtain counsel and dismiss their appeal with prejudice if they fail to do so.

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[2] Specifically, just as it did before the 2004 amendments, 20 U.S.C. § 1415(i)(2)(A) still provides "Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A).

[3] *See* 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(i)(2)(A).

Respectfully submitted

/s/ Christine Tomko Cossler
Christina Henagen Peer (0071579)
CPeer@ssd.com
Christine Tomko Cossler (0075340)
CCossler@ssd.com
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 Telephone
(216) 479-8795 Facsimile

Attorneys for Defendant-Appellee Parma City School District

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2005, a copy of the foregoing Appellee's Reply to Appellants' Memorandum in Opposition to Motion to Dismiss was sent by U.S. mail to Mr. and Mrs. Jeff Winkelman, 1853 Jacqueline Drive, Parma, Ohio 44134.

/s/ Christine Tomko Cossler
One of the Attorneys for
Defendant-Appellee
Parma City School District